No. 92-351

FILED
DEC 7 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary, KENTUCKY CABINET FOR HUMAN RESOURCES - - - - - - - - - Petitioner

versus

SAMUEL DOE, by His Mother and Next Friend, MARY DOE, Et Al. - Respondents

---

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

JOINT APPENDIX

WILLIAM K. MOORE
Counsel of Record
P.O. Box 4217
Midway, Kentucky 40347
Telephone: (606) 846-4431

MASTEN CHILDERS II
General Counsel
Cabinet for Human Resources
Counsel for Petitioner

KELLY A. MILLER
Counsel of Record
902 W. Highland View Drive
Boise, Idaho 83702
Telephone: (208) 336-8980

RONALD MARSTIN
Legal Aid Society
425 W. Muhammad Ali Blvd.
Louisville, Kentucky 40202
Counsel for Respondents

December 8, 1992

INDEX

	PAGE
Chronological List of Relevant Docket Entries ..	1
Plaintiffs' Complaint, Filed 10/25/82	3
Excerpts from Oral Depositions:	
Deposition of Edward Skarnulis, by Mr. Lawlor Direct Examination	15
Deposition of Edward Skarnulis, by Mr. Lawlor Redirect Examination	32
Deposition of Susan Turner, by Mr. McHugh Direct Examination	35
Deposition of Susan Turner, by Mr. Kasdan Cross Examination	37
Deposition of Verna Fairchild, by Mr. McHugh Direct Examination	39
Deposition of William Draper, by Mr. McHugh Direct Examination	40
Deposition of William Draper, by Mr. McHugh Redirect Examination	41
Class Action Order, entered 5/4/83	43
Excerpts from Oral Depositions:	
Deposition of Paul Mann, by Mr. Kasdan Direct Examination	44
Deposition of Karen Middendorf, by Mr. Lawlor Direct Examination	46
Deposition of Karen Middendorf, by Mr. Kasdan Cross-Examination	47
Findings of Fact, Conclusions of Law and Memorandum Opinion, Entered 3/28/84	49
Partial Summary Judgment, Entered 3/28/84 ...	62
Memorandum Opinion, Entered 1/9/86	64
Partial Summary Judgment, Entered 1/9/86	73
House Bill 477, Appendix to Plaintiffs' Motion for Preliminary Injunction, Filed 4/1/86	75
Memorandum Opinion of the United States District Court for the Western District of Kentucky entered 11/20/86	79

Preliminary Injunction and Partial Summary Judgment of the United States District Court for the Western District of Kentucky entered 11/20/86 88

Opinion of the Court of Appeals for the Sixth Circuit, 848 F.2d 1386, filed 6/15/88 90

Excerpts from Oral Deposition:
Deposition of Sandra Mlinarick, by Ms. Miller
Direct Examination 110

Deposition of Sandra Mlinarick, by Mr. Moore
Cross-Examination 110

Deposition of Sandra Mlinarick, by Ms. Miller
Redirect Examination 114

House Bill 511, Appendix to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction and/or Summary Judgment, Filed 5/18/90 116

Excerpts from Oral Deposition:
Deposition of Thomas Horton, by Mr. Moore
Direct Examination 144

Memorandum Opinion of the United States District Court for the Western District of Kentucky, Entered 7/1/91 160

Partial Summary Judgment and Preliminary Injunction of the U. S. District Court for the Western District of Kentucky, Entered 7/1/91 169

Opinion of the Court of Appeals for the Sixth Circuit, 965 F.2d 109, Entered 6/1/92 171

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 25, 1982 — NR. 3 — Plaintiff Doe's original complaint filed in U. S. District Court, Western District of Kentucky, Paducah Division.

May 4, 1983 — NR. 60 — Class Action Order certifying as a class action and designating class as all mentally retarded persons in Commonwealth of Kentucky who are presently committed or who may in the future be subjected to being committed to a state hospital, institution or other mental retardation residential treatment center involuntarily on the basis of their condition or mental retardation and who contend that said involuntary commitment violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution, 29 USC Sec. 794, KRS Chapters 202A, 202B, 210, and 31.

March 28, 1984 — NR. 106 — Findings of Fact, Conclusions of Law and Memorandum Opinion on motion of plaintiff for partial summary judgment.

March 28, 1984 — NR. 107 — Partial Summary Judgment that motion for partial summary judgment be denied insofar as it pertains to plaintiff's claims that mentally retarded persons should not be placed in Mental Retardation Residential Treatment Centers without a court determination of dangerousness and mental retardation; motion for partial summary judgment insofar as it pertains to policy of defendants in allowing parents an absolute veto power over the decision of the Release Committee to place a mentally retarded person in the community is sustained. Not final and appealable.

January 9, 1986 — NR. 117 — Memorandum Opinion of U. S. District Court, Western District of Kentucky, Louisville Division.

January 9, 1986 — NR. 118 — Partial Summary Judgment as to persons over 18 and who are profoundly or severely retarded, defendants may not admit to mental retardation residence treatment centers unless procedures in KRS 202A.071 and 202A.076 followed. Further, this judgment shall not take effect for 60 days, and parties shall meet together for purpose of working out solution to problems created by partial judgment. Further, any part of Court's March 28, 1984 opinion and order in conflict with Court's memorandum opin-

ion of this date and partial judgment of this date, set aside.

November 20, 1986 — NR. 126 — Memorandum Opinion on motion of plaintiff for preliminary injunction and summary judgment and on motion of defendant for reconsideration of opinion and partial summary judgment of January 9, 1986.

November 20, 1986 — NR. 127 — Preliminary injunction and partial summary judgment as follows: 1. Defendants enjoin from committing to mentally retarded treatment center, or any other facility for treatment of mentally retarded, any allegedly mentally retarded person over 18 years of age without first granting him or her judicial hearing to determine whether or not he or she should be committed under standards set out in KRS 202B.040(1-4). Defendants likewise enjoined from continuing to confine any allegedly mentally retarded person in any such institution after he or she has reached 18th birthday, unless judicial hearing and determination made that said standards set out have been met. Such hearing shall take place not later than 3 months after person already committed has reached age of 18. Confined mentally retarded person referred to in preceding 2 sentences may continue to be confined between time such person attains age of 18, and time he or she receives required judicial hearing. Plaintiffs shall give security in amount of $ 100. 2. Plaintiffs further granted partial summary judgment on issue of unconstitutionality of KRS Chapter 202B as amended, such statute being in violation of due process and equal protection rights of plaintiff. 3. Parties shall have 60 days from date of this order to meet and confer for purpose of submitting to Court agreed compliance plan for provisions of judicial proceedings in accord with opinion entered this day.

June 15, 1988 — Opinion of the Court of Appeals for the Sixth Circuit.

July 1, 1991 — Memorandum Opinion of the U. S. District Court for the Western District of Kentucky.

July 1, 1991 — Partial Summary Judgment and Preliminary Injunction of the U. S. District Court for the Western District of Kentucky.

June 1, 1992 — Opinion of the Court of Appeals for the Sixth Circuit.

Civil Action No. C 82-0197-P(J)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

SAMUEL DOE, by his Mother and next friend, Mary Doe, on behalf of himself and all others similarly situated, - - - - - *Plaintiff*

v.

BUDDY ADAMS, Secretary, Kentucky Cabinet for Human Resources; and
JACK FARLEY, Public Advocate, Kentucky Department of Public Advocacy, individually and in their official capacities, - - - *Defendants*

COMPLAINT

I.
PRELIMINARY STATEMENT

1. This is a class action for declaratory and injunctive relief to require defendants to make available to the involuntarily committed mentally retarded the same procedural safeguards and guarantees which they make available to the involuntarily committed mentally ill, including but not limited to the right to trial by jury, the right to counsel, and the right to periodic judicial review at least every 360 days of the order authorizing involuntary commitment. Defendants' refusal to assure that the plaintiff and the class he represents are provided these and other procedural safeguards, guaranteed to the involuntarily committed

mentally retarded under the provisions of KRS 202B and KRS 202A, violates their rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and Section 504 of the Rehabilitation Act, 29 U.S.C. §794.

II.
JURISDICTION

2. Jurisdiction in conferred on this Court by 28 U.S.C. §1343(3) and (4), which provides this Court original jurisdiction in all civil actions authorized by 42 U.S.C. §1983 to redress the deprivation, under color of state law, of any right, privilege or immunity secured by the Constitution and laws of the United States, and 28 U.S.C. §1331, which provides this Court original jurisdiction in all civil actions arising under the Constitution and laws of the United States. The declaratory and injunctive relief sought is authorized by 28 U.S.C. §§2201 and 2202, Rule 57 of the Federal Rules of Civil Procedure, and 42 U.S.C. §1983. Jurisdiction of the state law claims is conferred under the doctrine of pendent jurisdiction.

III.
PARTIES

3. Plaintiff Samuel Doe is an indigent severely mentally retarded person who is involuntarily committed to Outwood State Hospital [Outwood], a State institution for the care and treatment of the mentally retarded located in Christian County, Kentucky. Plaintiff has been institutionalized at Outwood for over ten (10) years. This action is brought on his behalf by his mother and next friend, Mary Doe.

4. Defendant Buddy Adams is Secretary of the Cabinet for Human Resources. In that capacity, he has the authority and responsibility under KRS 210.045 for the administration of all State institutions and facilities for the mentally retarded, including but not limited to responsibility to assure that mentally retarded persons involuntarily committed to any State institution or other facility are afforded all the rights guaranteed under KRS 202A and KRS 202B.

5. Defendant Jack Farley is the Public Advocate for the Commonwealth of Kentucky authorized under the provisions of KRS 31. In that capacity, he has the authority and responsibility for administration of the Kentucky Department of Public Advocacy which maintains and operates a state-wide program for the individual representation by counsel of indigent persons who are at risk of or are being subjected to incarceration or confinement based upon a condition of mental disability.

6. The defendants are sued individually and in their official capacities. In all activities and at all times relevant to this Complaint, the defendants acted under color of State law.

IV.
CLASS ALLEGATIONS

7. Plaintiff Samuel Doe brings this action on behalf of himself and all others similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Plaintiff seeks to represent the class of all mentally retarded persons in the Commonwealth of Kentucky who are at risk of or are being subjected to involuntary commitment to a State hospital, institution or other mental retardation residential treatment center on the basis of their condition of mental retardation.

8. The class defined in ¶7, *supra*, comprises in excess of 1100 mentally retarded persons statewide who are at this time involuntarily committed to various State facilities. In addition, there is an indeterminate number of mentally retarded persons who are at risk of being involuntarily committed to those same State facilities. As such, the members of the class are so numerous that joinder of all members is impracticable.

9. Virtually all members of the class are indigent.

10. All members of the class are directly affected by the practices and policies of the defendants which preclude or otherwise result in a refusal to make available the precommitment and post-commitment procedural safeguards guaranteed under KRS 202A and KRS 202B. As such, all members of the class share in common the same questions of law and fact with respect to the actions of defendants.

11. The claims of plaintiff, as representative party, are typical of the claims of the class. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has no interest which is now or may be potentially antagonistic to the interests of the class. Plaintiff is represented by the Legal Aid Society, Inc. and Western Kentucky Legal Services, Inc., whose counsel are experienced in class action civil rights litigation, including the rights of the institutionalized mentally retarded.

12. The parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

V.
FACTUAL ALLEGATIONS

13. Over ten years ago, plaintiff was committed at the initiative of his mother to the custody and care of State officials of an agency now known as the Kentucky Cabinet for Human Resources. Plaintiff was committed at that time to Outwood due to his condition of mental retardation. Plaintiff has remained institutionalized at Outwood since that time.

14. In 1977, the Facility Administrator of Outwood petitioned under the provisions of KRS 203 to have plaintiff declared incompetent to manage his estate and affairs.

Shortly thereafter, Christian County Circuit Court entered an order declaring plaintiff to be incompetent for the purposes of KRS 203. Later in 1977, a Circuit Court order authorized the mother of plaintiff to act as Committee (i.e., legal guardian) for him, for the purposes of KRS 387.

15. Other than the events described in ¶14, *supra*, pertaining to the incompetency proceedings and appointment of committee for plaintiff pursuant to KRS 203 and KRS 387, no other state judicial proceedings have been initiated or have taken place at any time pertaining to plaintiff with regard to his admission to, continued confinement at, or discharge from Outwood.

16. At no time during his confinement at Outwood have defendants made available or has plaintiff otherwise obtained judicial review, the assistance of counsel, to the benefit of trial by jury or other procedural safeguards and guarantees with regard to his commitment to Outwood, per the requirements of KRS 202A and KRS 202B.

17. At all times during his confinement to Outwood, plaintiff has remained subject to indeterminate commitment without authority of court order pursuant to KRS 202A, KRS 202B or any other provision of state law authorizing the commitment of plaintiff to the custody and care of defendants.

18. Plaintiff is a member of the plaintiff class, per the Opinion and final Judgment entered by Chief Judge Allen in *Kentucky Association for Retarded Citizens* v. *Conn*, 510 F.Supp. 1233 (W.D. Ky. 1930). aff'd, 674 F.2d 582 (6th Cir. 1982). As such, plaintiff has been determined to be involuntarily committed for the purposes of KRS 202B, and defendants are precluded under principles of *res judicata* and estoppel from asserting that plaintiff is not involuntarily committed or that he is not entitled to the rights guaranteed to him under KRS 202A and KRS 202B.

19. The various State facilities to which the defendant Secretary authorizes the commitment of the plaintiff and plaintiff class members, including but not limited to Outwood, are programs or activities which receive federal financial assistance. The various State facilities to which the defendant Secretary authorizes the commitment of mentally ill persons are programs or activities which receive federal financial assistance.

STATUTES AND REGULATIONS PERTAINING TO THE INVOLUNTARY COMMITMENT OF THE MENTALLY RETARDED

20. KRS 202B is a statutory Bill of Rights for the mentally retarded. KRS 202B embodies, *inter alia*, procedural safeguards and guarantees pertaining to the involuntary commitment of mentally retarded persons. No such involuntary commitment may take place without the consent of the defendant Secretary of the Cabinet for Human Resources.

21. The involuntary commitment of a person on the basis of mental retardation may not occur without a determination, *inter alia*, that the person is mentally retarded, that he is a danger to himself or others, and that the least restrictive mode of treatment for that person requires placement in a hospital, institution or other mental retardation residential treatment center, per KRS 202B.040.

22. KRS 202B explicitly incorporates all procedural safeguards and guarantees embodied in its companion statute, KRS 202A. Specifically, KRS 202B.050 provides: "All rights guaranteed by KRS Chapter [ ] 202A . . . to mentally ill persons shall apply to mentally retarded persons."

23. The rights guaranteed to both the mentally ill and the mentally retarded under the provisions of KRS 202A and KRS 202B include specific precommitment and

postcommitment procedural safeguards and guarantees, including but not limited to the right to notice and hearing, the right to trial by jury, the right to counsel, and the right to judicial review of the order authorizing the involuntary commitment of the person on the basis of mental disability at least every 360 days.

24. KRS 202B.060 requires the defendant Secretary to adopt rules and regulations for the specific purpose of the proper administration and enforcement of KRS 202B. The defendant Secretary has promulgated regulations pursuant to KRS 202B.060 which became effective over five years ago, on June 1, 1977. See 902 KAR 12:010-050, entitled "Hospitalization of Mentally Ill and Mentally Retarded."

25. Under the heading entitled "Due Process for Patients", 902 KAR 12:010 recognizes and provides that the defendant Secretary has the duty to promulgate rules and regulations:

> which protect, defend, and uphold the statutorily numerated rights of all persons who face the possibility of residing in a state mental institution. Consistent with this authority and requirement, this regulation establishes certain minimum standards which must be met in order to assure due process of law for the residents of state mental institutions and for individuals named in any petition or civil proceeding which could result in their admittance to a mental institution.

These same regulatory provisions provide procedural safeguards and guarantees, including but not limited to the right to notice and hearing, the right to jury trial, and the right not to be involuntarily committed for a period of more than 72 hours unless formal court proceedings are initiated for the purpose of authorizing involuntary commitment for any longer period of time.

26. These same regulations further required the defendant Secretary, within 360 days of the effective date of the

regulations in June 1977, to take positive steps either to release any persons subject to "indeterminate commitment" to a less restrictive mode of treatment, or to initiate formal commitment proceedings provided for under KRS 202A in order to authorize continuing involuntary commitment of such persons to the institution for a specified period of time.

27. Defendants make available to the involuntarily committed mentally ill the procedural safeguards and guarantees required under KRS 202A, including but not limited to the right to notice and hearing, the right to trial by jury, the right to counsel, and the right to periodic judicial review at least every 360 days of the order authorizing their involuntary commitment.

28. Defendants have not and do not make available to the plaintiff and plaintiff class members the same procedural safeguards and guarantees they make available to the mentally ill who are at risk of or are being subjected to involuntary commitment.

29. The defendant Secretary and his agents have refused to comply with the procedural requirements of KRS 202A, KRS 202B and 902 KAR 12:010, including but not limited to the duty either to release plaintiff and plaintiff class members from indeterminate commitment to a less restrictive mode of treatment, or to take steps to initiate the formal commitment proceedings contained in KRS 202A which would result in a court order authorizing continued involuntary commitment for a definite period of time, not to exceed 360 days.

30. The defendant Public Advocate has the responsibility under KRS 31 to provide independent counsel to represent all indigent persons who are at risk of or are being subjected ~~to~~ involuntary commitment on the basis of a condition of mental disability, for the purposes of KRS 202A and KRS 202B.

31. The defendant Public Advocate has provided and continues to provide independent counsel to indigent persons who are at risk of or are being subjected to involuntary commitment for the purposes of KRS 202A and KRS 202B on the basis of a condition of mental illness.

32. The defendant Public Advocate has not and does not provide independent counsel to indigent persons who are at risk of or are being subjected to involuntary commitment for the purposes of KRS 202A and KRS 202B on the basis of a condition of mental retardation.

33. The defendants have been on notice for more than five years, since KRS 202A, 202B and 902 KAR 12:010 became effective in 1977, that plaintiff class members are entitled to the procedural rights provided under KRS 202A and 202B, including but not limited to the rights to notice and hearing, jury trial, representation by counsel, and periodic judicial review of their involuntary commitment.

VI.
CAUSES OF ACTION

34. Defendants, by virtue of their past and present practices, policies and omissions, which have resulted in plaintiff and plaintiff class members not obtaining the benefit of the procedural safeguards and guarantees provided for under KRS 202A and KRS 202B, violate the rights of the plaintiff and plaintiff class members secured by:

(a) The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which guarantees the right to equal treatment under the law, including the right of the mentally retarded to be afforded the same precommitment and postcommitment procedural safeguards and guarantees which are afforded to the mentally ill;

(b) The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which guarantees

the right not to be deprived of a protected liberty interest, including but not limited to the state-created entitlement to procedural safeguards and guarantees prior and subsequent to involuntary commitment, as a result of arbitrary, unauthorized and unlawful state action;

(c) 29 U.S.C. §794, which guarantees the right of the mentally retarded not to be discriminated against on the basis of their handicapping condition under any program or activity receiving federal financial assistance;

(d) KRS 202A, KRS 202B and KRS 210, which guarantee the State statutory right of the mentally retarded who are at risk of or are being subjected to involuntary commitment to a State facility to obtain the benefits of the procedural safeguards and guarantees set forth therein; and

(e) KRS 31, which guarantees the State statutory right of an indigent mentally retarded person to obtain representation by counsel whenever he is at risk of or is being subjected to incarceration or confinement on the basis of a condition of mental disability.

VII.
PRAYER FOR RELIEF

WHEREFORE, plaintiff prays this Court:

(a) Assume jurisdiction of this action;

(b) Determine as soon as is practicable, pursuant to Rule 23 of the Federal Rules of Civil Procedure, that this action is maintainable as a class action for declaratory and injunctive relief;

(c) Declare that the rights of the plaintiff and plaintiff class members are violated by the refusal of the defendants to make available precommitment and postcommitment procedural safeguards and guarantees, including but not limited to the right to notice and hearing, the right to jury trial, the right to counsel, and the right to periodic judicial review of the order authorizing involuntary commitment;

(d) Enjoin defendants from depriving the plaintiff and plaintiff class members of the precommitment and postcommitment procedural safeguards and guarantees to which they are entitled;

(e) Order defendants to identify all class members who are involuntarily committed to the custody of the Secretary and to take steps to assure, within a reasonable period of time to be set by the Court, that the involuntary commitment of the plaintiff and plaintiff class members is judicially reviewed and authorized, or that they are otherwise released to a less restrictive mode of treatment, as provided for under the procedures and standards set forth in KRS 202A and 202B;

(f) Order defendant to submit to the Court periodic written reports documenting their compliance with the relief granted by the Court, until such time as defendants achieve full compliance;

(g) Grant plaintiff his costs and reasonable attorneys' fees; and

(h) Grant any and all other relief to which the plaintiff and plaintiff class members may be entitled.

Respectfully submitted,

/s/ Brian P. Lawlor
Brian P. Lawlor
/s/ Richard W. McHugh
Richard W. McHugh
/s/ Kelly A. Miller
Kelly A. Miller
Legal Aid Society, Inc.
425 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
Telephone: (502) 584-1254
/s/ Nicholas J. Harding
Nicholas J. Harding
Western Ky. Legal Services, Inc.
501 South Seventh Street
Paducah, Kentucky 42001
Telephone: (502) 442-5518
Counsel for Plaintiff

Dated: October 25, 1982

17

DEPOSITION OF EDWARD SKARNULIS

Direct Examination by Mr. Lawlor:

• • • • • • •

Q.72 Can you define developmentally disabled for me.

A. There are two definitions of that term. The one that was most commonly used in the original definition of the phrase developmental disabilities was to encompass four major disability groups, mental retardation, cerebral palsy, epilepsy and autism, and that was the definition used by the federal government in the establishment of the Developmental Disabilities Act which I think was like 1973-74. But the most recent definition by the federal government has expanded that definition considerably and includes not only those four disability groups, but virtually anybody whose disability occurs during the developmental period of life.

Q.73 So would it be correct to say that mental retardation is included within the definition of developmentally disabled?

18

A. Yes, and that is the largest sub-group within that definition.

Q. 74 Are you familiar with the state institutions for the mentally retarded in Kentucky?

A. Somewhat.

Q.75 Can you identify them?

A. Oakwood facility at Somerset, Outwood in Dawson Springs. Although the facility is owned by the state, it is operated by a private agency. Hazelwood facility in Louisville and Central State which is located in Louisville.

Q.76 Are you familiar with a hospital or institution in Glasgow?

A. Yes. I am aware of that facility. My understanding is that that serves primarily people with emotional problems. We also have people with mental retardation who are being served in the Eastern State facility, Childrens Treatment Center and Western. And once again, that is not my area of expertise but I understand that their primary disability was identified as mental illness and secondarily, there are people with mental retardation.

Q.77 Are you familiar with the terms mildly retarded, moderately retarded, severely retarded and profoundly retarded?

A. Yes, I am.

Q.78 Can you explain what those terms mean.

A. Those are levels of mental retardation as defined in most standardized intelligence tests and the exact IQ scores that correlate to those levels differs somewhat depending on which standardized IQ tests you are talking about. But generally speaking, I think they go pretty much 50-75 IQ level is normally considered as mild level of disability, although that has now I understand dropped down to 70 IQ as the maximum. It used to be 50-75. 25-50, people with moderate level of retardation. 15-25, people with severe level and 1-14 are those with profound level of disability.

Q.79 Does it happen that an individual, a mentally retarded person may find himself in one category at one time and a different category at another time?

A. Yes, it is not a static concept.

Q.80 Okay, and what do you mean, it is not a static concept?

A. I mean IQ's change.

Q.81 Does adaptive behavior change?

A. Yes.

Q.82 Can you explain in a little more detail what you mean by not a static condition.

A. The definition of mental retardation once again used by the AAMD, American Association of Mental Deficiency and Rick Hooper implies that there can be many causes

for a person to score at a certain level on an IQ test. On a standardized adaptive behavior scale, those can be related to emotional disturbance. Those can be related to environmental factors, such as the conditions under which the testing was done. They can be related to the type of test used. There can be physical impairments, sensory or motor deficits that could cause a person to score at one level one time and a different level another time. And lastly, the technologies that are being developed in the field have enabled us to affect dramatic gains in a person's level of development that weren't even considered possible one or two decades ago.

Q.83 Can you name me some examples of those.

A. The use of behavior modification, for example, has enabled us to help people who were devoid of self-help skills, in years past developed most if not all of their self-help skill ability, and that translates on those standardized tests as a significant improvement on their scores. We have adaptive equipment that is being developed using space age technology that enables people whose hearing, visual and other kinds of deficits interfered with their functioning level on IQ tests to demonstrate remarkable gains in their ability to interact with their environment. Those are some examples.

Q.84 Are mentally retarded persons capable of improvement or change?

A. Yes.

Q.85 Is that true of all mentally retarded persons?

A. Yes.

. . . . . .

23

• • • • • • •

Q.95 Are the institutions in Kentucky that you are familiar with for the mentally retarded viewed as a restrictive environment by you?

A. Can I ask my attorneys their advice on whether or not I need to answer that?

Q.96 Do you know the answer to the question?

A. Do I have an answer to the question?

Q.97 Yes.

A. Well, it depends in what capacity I am going to answer the question-whether I am answering as a state official or as a professional or personal.

Q.98 Well, for purposes of a deposition, you don't get a choice.

A. I'd still like to ask them if I have to answer that.

Mr. Kasdan: Go ahead and answer and if we need to follow up on it, we'll do it during cross examination.

A. Yes, I consider that a restrictive environment.

24

Q.99 How is a state institution a restrictive environment?

A. Well, (1) it is located distant, in most cases, distant from the person's natural home community or family, the natural family. (2) it is a setting in which a large number of people perceived by society to be deviant are congregated together and increases the likelihood that the people living there will imitate the inappropriate behaviors of the other people there. (3) the fact that it is a congregate setting, as is true with most congregate settings, results in depersonalization and deindividualization. In other words, the individual needs have to be subsumed to the needs of the group and that of necessity, whether it is an Army boot

camp or an institution for anybody or a dormitory in a college requires that the individual rights and needs are sometimes set aside in favor of what is expedient or necessary for the institution as a whole. I consider those restrictions.

Q.100 Is it restricted in terms of physical ability to move around?

A. Yes.

Q.101 How is it—would you view it as more restrictive than a community placement in the New Neighbors Program?

A. Yes.

25

Q.102 Can you explain the difference?

A. Well, using the same parameters, people who are in the New Neighbors Program by and large, we have returned to their home community, where that was possible and where that was appropriate. So they are in their natural home community. Number two, people in the New Neighbors Program are surrounded by normal models rather than other people with mental retardation. Number three, since they live in normal ordinary housing, their individual needs can be attended to and programs can be more personalized. Lastly, within the limits of their disability, they are given free access to the entire array of generic community resources.

Q.103 Can you give me some specific examples of community living arrangements which you would consider less restrictive than the state institutions in Kentucky? What I am suggesting are different modalities, perhaps I don't know if I am using the right words.

A. What I can do is to describe some of the New Neighbors living arrangements.

Q.104 That would be fine.

A. Near Flemingsburg, we have a house which has been leased by the agency providing the services, a

farmhouse which is located just on the outskirts of town serving three young adults with severe

behavior problems and they have a number of fulltime staff who have been trained in behavior modification to work with those three young adults in modifying some of the very, very self-destructive behaviors that those young adults are engaging in. While it has the disadvantage of not being located in the community itself, the people that they relate to on a daily basis are people, so-called normal individuals. They are living in ordinary housing. They are close to their natural families. Those are young people with severe and profound levels of mental retardations.

We have some children in Louisville who have been placed in existing housing and families have been hired and paid to serve those children. Many of the children are children with severe and profound levels of disability with medically, related medical problems. The families are given support in the form of Respite and professional services to serve those children.

In Owensboro, we have some young adults, two men with moderate level of disability who are living with a staff member who is about their same age and the three of them live together in an apartment and the two young men go to a vocational center during the day. All of the people in the program have a day

program of some sort.

Q.105 By day program, are you—

A. Either a vocational program for adults or a normal schooling for children.

Q.106 In the cases you've illustrated, does that mean they go to a program which is other than the location of the residence where they are sleeping at night?

A. Yes.

Q.107 Do you have any other examples you can offer?

A. We have a young adult living in Paducah who lives by himself in a house that he pays for, that he rents and about 100 yards away is another house that is owned by the people who are responsible for providing him with support services.

We have a young lady who is a middle-aged woman who is living with a retired couple. She was a hospital administrator for many years in Detroit, Michigan and the husband was working in juvenile corrections for many years. Despite the fact that they are nearly 70 years old, they are both very, very capable and competent people who are in effect serving as a friend to this young lady with mild level of mental retardation.

The system that we have set up as much as possible tried to key in on the individual needs of the person

and develop an alternative that is most closely related to what they need.

Q.108 Is a person precluded from community placement because they are severely or profoundly retarded?

A. No.

Q.109 How is it that someone who is severely or profoundly retarded could be capable of living in the community living arrangement?

A. Reality is that most people live in the community; at the most no more than two to three percent of people with mental retardation have ever lived in an institutional setting at any one time. For every person in one of our institutions, there is 10 that is living in a community program with equally severe medical, behavioral or other kinds of problems. The real question, as I pointed out earlier, is not simply the level of ability of the person but the ability of the community to provide adequate resources or the family to provide adequate resources to sustain the person in the community.

. . . . . .

30

Q.113 Now would you be aware of whether or not a person is going to be placed out of an institution into a particular community living arrangement under the New Neighbors Program?

A. Yes.

Q.114 And how is it you would know that?

A. Normally the facilities either directly or through the Division for Institutional Care provide us with the names of the people that they feel are candidates for movement to the community. We serve as the liaison with the community programs.

Q.115 What information are you provided from the institution with regard to those clients?

A. Usually the information at that point, point of referral is minimal and we are talking mainly about name, age, sex, and community of origin.

Q.116 On the basis of that information, do you authorize the community placement?

A. What we do is to bring together the community-based program people with the institution people and the two of them meeting together, review the case and look at the ability of the community program to serve that person's needs.

Q.117 Does the community program—I take it you are alluding to the Comp Care Center, is that accurate?

A. Yes or their affiliate agencies if they aren't

31

providing the services themselves.

Q.118 But for a general, for discussion purposes essentially, there is three entities involved—the institution, your agency, the Division, and the Comp Care Center or some counterpart to that.

A. Yes.

Q.119 Now from whom does the Comp Care Center obtain the information regarding the individual client? Is it from you or from the institution?

A. It has been—we have done things both ways where there was a question of confidentiality where the family was—we'll say the legal guardian. We have, after the family's approval of release of information, normally it has gone through us to the community programs.

Q.120 What happens if they don't give you a release of information?

A. If the family has not allowed or has objected to the placement of the person, we have not been allowed access to them for purposes of placement.

Q.121 Who has not been allowed access to them?

A. Our division or the community programs.

Q.122 Who does not allow you access to those clients?

A. My understanding is that the way in which the state laws are written, we are not allowed to do this.

Q.123 I'd like to know who—has it happened that you have

32

requested information that you cannot obtain on particular clients?

A. In some cases, yes.

Q.124 Who tells you you cannot get that information?

A. The Division for Institutional Care or the facility. I want to clarify that. Our division as an agency of the state would have the same access to information as the Division for Institutional Care but the point is that our division would not be able to share that with the community programs.

Q.125 Have you ever requested—your agency, not the Comp Care Center—but has your division requested infor-

mation regarding clients that has not been provided to you by the facility?

A. Not to my knowledge. Once again, we'd have no reason to ask for that information unless it was to be used by our agents, which are the Comp Care Centers.

Q.126 Have you ever requested information regarding a particular client in a state institution which the division has declined to share with you?

A. I have never asked for that information. In other words, I've never had that happen.

Q.127 Has it happened that there is a client on whom you have information that you have not been permitted to transfer that information to a Comp Care Center?

A. Yes.

Q.128 Can you explain to me what the circumstances were.

A. Well, in the initial phases of the New Neighbors Program, we were planning to share information on all residents of our facilities who came from a given region that was paritcipating in the New Neighbors Program. We were planning to share that information with them. When it was called to our attention by the parents organizations, concerned parents organizations that—

Q.129 Would that be the concerned parents of Hazelwood?

A. Yes, actually, I believe it is called the Four C's which represents, claims to represent all the institutions. They called to our attention that they felt that would be a violation of confidentiality and not in keeping with the legislative intent for sharing that information and I understand, this is strictly word of mouth, but the implication was that they would sue if we attempted to share that information with the community.

Q.130 From whom did you draw that implication?

A. Mr. Draper, the Assistant Commissioner.

Q.131 Was it represented to you by Mr. Draper that he had spoken to representatives of the concerned parents group?

A. Yes.

Q.132 Would one of those people mentioned be Louise Underwood?

A. I don't recall who it was he spoke with.

Q. 133 Are you familiar with Louisa Underwood?

A. I've met her.

Q.134 Mr. Skarnulius, what is the—is there a particular practice or procedure set up for the transmission of this kind of information generally? What is supposed to happen?

A. I don't have the procedure in front of me but the procedure as it is being operated now is that the people, the staff members in the facility identify those individuals they feel are the most likely candidates for placement into a community program.

Q.135 Is there any requirement about when that information is to be transmitted to you?

A. Yes.

Q.136 What is that requirement?

A. Well, one of the main requirements is that they first determine whether or not the family is in agreement with sharing that information with the division and with the community programs. Once that has been determined that the family is in agreement with the person being considered as a candidate for community programs, then our division is notified of that fact and our division in turn contacts the community program.

Q.137 Who are you notified by?

A. The Division for Institutional Care.

Q.138 So does the information go from the institution to the Division for Institutional Care, who then transmits the information to you?

A. That is right.

Q.139 Has any other procedure been used in the past?

A. I understand that at least several years ago and I don't know, I wasn't in the state when this happened but that information was allowed to flow freely from institutions to community and back because the community programs were viewed as agents of the state for purposes of provision of services but that was stopped after the state was—well, I believe—I am not sure on this but I believe the community programs were found not to be agents of the state. We are not state agencies and also there was opposition from some of the institution parents.

Q.140 When was it that the practice was stopped that you know of?

A. Approximately two years ago.

Q.141 Sometime in 1980 or 1981?

A. 1980.

• • • • • • • •

39

• • • • • • • •

Q.156 Were you told not to transfer that information to the Comp Care Center?

A. That is right.

Q.157 And who told you not to transfer the information?

A. Mr. Draper.

Q.158 Do you recall when that occurred?

A. October or November, 1980. I think it is the same incident that we were talking about before.

Q.159 Were you eventually permitted to transfer that information without the parent's permission?

A. No.

Q.160 Have you ever been permitted to do so?

A. No.

Q.161 Given that, is it your understanding that it is the existing policy not to transfer information on a particular client in those cases where the parent objects?

A. Yes.

Q.162 Has it occurred that, can you give me an idea of the approximate number of such cases that you are aware of?

40

A. I can only say that we have moved some 140 plus people out since the project began with the exception of a few who are already in the community, a small number. Most of those were institutional residents and virtually all of them came out either with parental permission or with their not having any parents who were able to speak for them. And the Guardianship Office of the state represented them, gave permission for placement. In addition, there are some 36 who have been identified that we are planning to place between now and April 1st. So I know of 170 or 180 people who have been deemed to be candidates of the 850 plus who are residents of the institution at the beginning of this project. I don't know to what extent the Division for Institutional Care has looked at all of the other remaining people but I do know that many of them if not most of them, the parents have refused permission for placement.

• • • • • • • •

45

• • • • • • • •

Q.191 Is it your understanding—do you have and understanding whether it makes any difference if the parent is not the legal guardian at the time they make the objection?

A. We have not differentiated.

Q.192 Has there been an occasion where the state is the legal guardian but a parent objects to the community

46

placement?

A. Yes.

Q.193 And what happens in that situation?

A. At this time, we have been instructed not to place those people.

Q.194 Who has instructed you not to do so?

A. I am not sure what the source is but the instructions have come from the Assistant Commissioner.

Q.195 And who is that?

A. Mr. Draper.

Q.196 Is it your understanding that the parents have to agree before the client information is transferred from the particular institution to the division itself?

A. No.

• • • • • • •

48

• • • • • • •

Q.200 And what do you mean by serious?

A. We know that the ability of the community programs to expand and take people into those programs has been much greater than our ability to refer candidates for placement. The community programs and both our Division and the Division for Institutional Care have been concerned about the difficulty of getting parental permission in a lot of cases.

Q.201 Has this resulted in delays in the placement of people?

A. Yes, it has.

Q.202 Have you received complaints from the community programs at the Comp Care Centers regarding this

problem?

A. Yes, we have.

Q.203 And to whom have those complaints been directed, do you know?

A. To the staff in my division, myself, Mr. Draper, the Secretary, the Commissioner.

• • • • • • •

55

• • • • • • •

Q.235 Mr. Skarnulis, I would like to hand you a memorandum dated March 18, 1982, which I will mark as Exhibit 19. Have you had an opportunity to review Exhibit 19?

A. Yes, I have.

Q.236 Now in this memorandum, a number of problems are identified. Is it correct that you were involved in the preparation of these memorandums?

A. Yes, I was.

Q.237 The second paragraph of the memorandum refers to greater and greater difficulty in identifying and accomplishing placement of individuals residing in state facilities and that there are barriers to placements. Can you explain what is referred to in that paragraph.

A. The biggest barrier to placement is the one that has been alluded to before in this deposition and that is

56

that numerous parents were asked for permission to allow their son or daughter to leave the facility and refused permission for their son or daughter to leave.

Q.238 I'll refer you to page two, top paragraph. That identifies nearly 70 percent of families who are mailed a request for release of information fail to reply. Do you have any better statistical information at this time regarding the failure of parents or families to respond regarding

release of information?

A. Not statistical information, just the observation that it has continued to be a problem throughout the project.

Q.239 I'li refer you paragraph three on page two. It indicates that a second problem is the legal status of several residents is in limbo. Can you refer the problem that is referred to in that paragraph.

A. These were people with mental retardation, committed as children to the Bureau for Social Services which is now the Department for Social Services.

Q.240 What kind of problem is that creating?

A. The fact is that they are no longer children; they are now adults and that technically, under the law, when they reach their majority, they are not wards of the Department for Social Services but are adults

in the legal sense in their own right unless a request for a competency hearing and adjudication of incompetency as an adult is what is determined. That was the problem that was referred to there.

. . . . . .

. . . . . .

Q.270 Are the facilities themselves placing people in the community under the New Neighbors Program?

A. Not under the New Neighbors Program, no.

Q.271 Do you have any idea how many persons have been placed in the community by state institutions over the objections of the parents?

A. To the best of my knowledge, none have been. One case is currently pending but that is the only one I know of and I don't think that has been decided yet.

Q.272 Is it your understanding that in such a circumstance that the placement does not occur pending appeals

under Senate Bill 285?

A. Yes.

Q.273 Does that Senate Bill 285 procedure referred to in that paragraph the same procedure as the discharge protocol under Exhibit 16?

A. It is contained in that discharge protocol document, yes.

. . . . . .

. . . . . .

Q.310 Are there any other problems that you are alluding to that you needed help with from Ms. Fairchiid in this memorandum?

A. There are no other problems other than those contained in the memorandum. The single biggest problem repeatedly has been the objections of the concerned parents organizations to this program.

Q.311 I would like to refer you to the first page of information pertaining to actual individual residents and I know the names are deleted. At the bottom of that page, it refers to a term called waiver. Would you please explain what that means.

A. Because of the fact that we wanted this community program to be well received and perhaps be a harping of things to come, we wanted to try to wherever possible have the community programs serve people that they were truly capable of serving where they had adequate resources, adequately trained staff to meet their needs. We didn't want anybody to get hurt or neglected when they came out into this program. So we did ask them to the extent that they could assess the needs of their people that were being

referred to them and wherever they felt they could not serve somebody, to let us know. The Division then would personally send out staff members who would see those

people and talk with both the institutional staff and the community staff and where we agreed that the community was legitimately objecting to serving those people, the division would grant a waiver. One of the reasons we implemented this plan was also because we didn't want regions simply serving people who were the easiest to serve and then not serving other people who had greater needs.

Q.312 What problem were you anticipating?

A. Well, there was some concern that some of the regions had been accustomed in the past to serving people with mild levels of disability with no medical or behavioral problems.

Q.313 Are such persons capable of community placement?

A. Well, all persons are capable of community placement given adequate resources.

Q.314 Go ahead. You were explaining the problem—

A. There was concern that some of the regions who would be given a grant of X number of dollars would simply select only those people who required few, if any, resources, and yet they would be getting a flat grant that would be as great as another region that was serving people who are relatively difficult to serve.

• • • • • • •

108

Redirect Examination by Mr. Lawlor:

• • • • • • •

Q.17 Mr. Skarnulis, you have described particular policy of not placing people in those cases where the parents object. I am talking about placement in the community. Do you agree with that policy?

109

A. No.

Q.18 And why do you not agree with it?

A. I think the needs of the person with mental

retardation should predominate and not the needs of the parents.

Q.19 Based upon your extensive professional experience, has it occurred that parents may make the wrong decision?

A. I don't consider the needs or the rights of the parents as synonymous with the needs or rights of the people with mental retardation in all cases, no.

Q.20 And why is that?

A. Because I think that—and this is equally true with parents of people with normal intelligence that parents are not omnicient and they are fallible and sometimes their knowledge base, particularly if they have been separated from their son or daughter for many, many years, is based on a knowledge that they were given by professions in the field 10, 20, 30 years ago which is inconsonant with the knowledge base we have today.

Q.21 Is it your impression that the complaints or controversy promoted by some parents in the State of Kentucky stems form just a simple lack of knowledge?

A. I think in most cases, 90-95 percent of the cases, that is true. I think there are some people involved

110

in that controversy who at this point are getting more secondary gain, ego enhancement, power, needs met than anything else. I don't think the needs of the people involved are primary to them.

Q.22 Can you explain various reasons that might cause a parent to make a wrong decision about the placement of their son or daughter.

Mr. Stratford: Don't you think we are going kind of far afield even if this is when you started? Now how is he going to know—

Mr. Lawlor: Stanley, he brought it up. Marty brought it up. I didn't bring it up.

Mr. Stratford: He didn't bring up this kind of speculation.

Mr. Lawlor: Marty Kasdan brought it up.

Mr. Stratford: Brought up what?

Mr. Lawlor: He brought up this whole thing about the controversy and whether parents should be able to do this or that.

Mr. Stratford: He brought up whether there was a controversy and he said yes, there was, but he didn't go

into the speculation concerning the operation of the minds of these parents.

Mr. Lawlor: Okay, fine, your objection is noted.

Q.23 Based upon your professional experience, Mr. Skarnulis, can you explore with us some of the reasons why a parent might make an inappropriate decision regarding the placement of their son or daughter.

Mr. Kasdan: Dr. Skarnulis, we entered an objection. Go ahead and answer and the court will rule on that at a later date. It will either keep your answer in or strike it as it sees fit.

A. I have already alluded to some of those, I think, that in some cases, the level of knowledge of the professionals, social workers, psychologists, doctor, might be such that their advice to the parents, however well-intentioned, was not in keeping with the best of thinking in the field.

Q.24 Does it happen that parents are motivated to continue to keep their children in an institution, their son or daughter in an institution, out of concern about whether or not there will be a place for their son or daughter to live after they are gone?

A. I think with many parents that is the concern, that the community programs are new and developing and

haven't been established long enough to satisfy them that they will be stable.

Q.25 Does it happen that parents lack certain information about the capabilities of their son or daughter?

A. Yes, I think some parents' assessments of their son's and daughter's potential is understated.

• • • • • • • •

DEPOSITION OF SUSAN TURNER

Direct Examination by Mr. McHugh:

• • • • • • • •

Q.78 And it is not a regular policy to ask them to come in, is that correct?

A. No, but they are certainly invited to come in on any case that it is legal for them to come in. We can't just ask them if the family doesn't want them. That has to—we have to have permission for release of information.

Q.79 Now just speaking as far as the committee, the Record Review Committee, okay, is there any committee role in release of individuals from the facilities?

A. No, except the only role is that we generally make a recommendation as to what we think would be appropriate for placement, the type of placement that the person would need. And we also make recommendations as to what we think the person needs such as self-help skills or whatever. So our recommendation would be this is what the person needs and when they get this, then the person is ready for placement out of the facility.

Q.80 Okay, perhaps—let's go through the procedure. You said no, there was no committee role but then you went on to list a number of things.

A. The committee does not have ongoing roles in the facility.

Q.81 For example, somebody is going to be released. Is there a Record Review Committee meeting that is held?

A. No. There is a treatment planning or a discharge planning meeting at the facility and someone from here may very well sit in on it but it is not, it would not be in our role; as Record Review Committee Chairman would not be the reason I would sit in on the meeting.

Q.82 In terms of these admissions procedures that we have talked about, is there any difference in the way you treat a mentally retarded minor and mentally retarded adult?

A. Depending on how minor, I think. Yeah, if somebody is seven years old, there might be somewhat of a difference in that we would—even with a seven-year old, if they could sign in addition for themselves, we probably would. There would be very little difference unless the person was mildly retarded and competent in his own right. And then of course, an adult who would be competent in his own right would, for that instance, then be responsible for himself.

34

Q.83 So really what you are saying, there is a difference between competent people and incompetent people and not between adults and children or adults and minors, is really what I want to ask.

A. I guess. We have very, very few people that would be in an MR facility who would be considered competent. They may have some degrees, under the new guardianship, you know, there is competency and competency and competency. So they may have certain varying degrees of competency. So I hate to use that term but I would say between the person who was competent in the very strictest sense and the individual who is incompetent. However, we do on anyone who is functioning well enough to really understand the process of being there, we do, whether they are 15 or whether they are 45, we do ask them about being there and request some type of indica-

tion that they understand and know this such as an X if they can't write. Most of them, many of them who would be functioning at that level would be able to sign their names. We have very few people who would be functioning that well though—very, very few.

• • • • • • • •

71

• • • • • • • •

Q.226 As far as their being fewer mildly and moderately retarded persons at Outwood or at Oakwood or at Hazelwood, there are still mild and moderately

72

retarded persons in those facilities today, isn't that correct?

A. At Outwood, I think we have moved—if there are any, there are very, very few because of court order to move anyone that is mild or moderately retarded out of Outwood. Oakwood still has a few but anyone who is mild or moderately retarded at Oakwood has a severe behavioral concomitant or physical disability concomitant that makes them unable to function.

Q.227 The same for Hazelwood?

A. Hazelwood has very, very few mild or moderately retarded. They have had a few and do have a few but again, it is a question of other physical handicaps.

• • • • • • • •

82

Cross-examination by Mr. Kasdan:

• • • • • • • •

Q.32 Would you briefly describe the degrees of mental retardation that you have been referring to?

A. Okay, there is mild, moderate, severe and profoundly retarded. There are numbered categories of IQ, but more, anybody's whose IQ is between say 50 and 75, 50 and 70, I can't remember exactly, 50 and 70, is considered to be mildly retarded. A person who is functioning between, and I really can't remember

83

these numbers, between 35 and 50 is generally moderately retarded. I'm probably off two or three numbers on each one. So the numbers are really not that important. Generally, between 20 and 35 are severely retarded and below 20 are profoundly retarded. Now in addition to these numbers that they find from psychological testing, people, in order to be diagnosed as mentally retarded, must have their functioning level also evaluated. And the American Association of Mental Deficiency has a functional level, the ability for a person to have their behavior assessed for adaptive behavior, how well they function. A person may have "an IQ of 65" but they are able to go out and function. They can take care of themselves. They can do all of these things. They may be considered really a borderline individual as opposed to a truly retarded person because their adaptive functioning is within the normal range, or it might be just the opposite. A person may be only mildly retarded according to the scores that they score, but their adaptive behavior may be very low. They just for some reason, whether it is emotional or physical handicap or whatever, keep them from functioning at that level and their adaptive behavior may even be lower than their score. So they definitely would be considered within the retarded range.

84

Diagnosing someone as retarded is not done by just any little, just one little criteria. It is done on the basis of numbered criteria but the most, the lowest functioning individual will be within the profound range. This person may be functioning at a mental age or a functioning level anywhere from one day to probably about six or eight, maybe eight months, maybe a year. These people, if they may be 25 and functioning at the level of a nine-month old individual, then they would generally be profoundly retarded. Their level of retardation can go beyond that.

Severely retarded people are generally functioning, if they are adults, like a person between two and

three years old, something like that, sometimes four. Their abilities are concomitant with or similar to the person who is that young. This would be developmentally. Now they would have some other areas where they might be strong and would be able to function pretty well. Then you work your way up to the mildly retarded person who is functioning like you and me except for maybe their ability to lead or understand perhaps the written word.

• • • • • • • •

22

DEPOSITION OF VERNA FAIRCHILD

Direct Examination by Mr. McHugh:

• • • • • • • •

Q.134 Under this protocol, which is in Exhibit 16, how does the discharge procedure work for someone who is in a state facility for mental retardation?

A. I'd have to sit here and read this. It has been a year since I've written it.

Q.135 Are you involved on a day to day basis with these kinds of decisions?

A. With what kinds of decisions?

Q.136 Discharge from the facilities?

A. Not directly. On individual discharges?

Q.137 Yes.

A. Not directly, no sir.

Q.138 But these are the procedures that are followed, is that correct, the ones that are in Exhibit 16?

A. To my knowledge, yes.

Q.139 Would you be familiar in a general way with whether or not there have been in cases parental objections to placement in community facilities?

A. Yes sir.

Q.140 And under the discharge protocol, there is a procedure for persons to, either the guardian or the par-

ents

23

to object. Is that correct?

A. That is correct.

Q.141 Do you have any idea what the number of cases are in which parents have objected to the release of their children to community placements are?

A. Not offhand, no sir.

Q.142 Would it be less than 50?

A. I don't have any idea.

• • • • • • • •

32

DEPOSITION OF WILLIAM DRAPER

Direct Examination by Mr. McHugh:

• • • • • • • •

Q.71 Now, as you indicated, at this time there is a policy that if the guardian objects to a community placement, except in obvious cases, you are honoring that objection? Is that correct?

A. That's true.

Q.72 Now, what if the guardian and the parent are not the same person, what is the policy?

A. At this point, our policy is that if the parent objects, we would not proceed with the placement because the parent also has the right under KRS 210.270, they are recognized as someone who can object to that and who can offer the appeal and at this point it's simply the policy that either the parent or the guardian's objections will be honored because we feel we have an adequate number of people in our facilities for whom no objection is found who also need community placement that we can move with a steady progression into the community.

• • • • • • • •

68

• • • • • • • •

Redirect Examination By Mr. Hugh:

Q.1 In terms of the KRS 210.270 procedure and the parental objections, at this time there is something extra there, not just the 210.270 procedure? Is that correct?

A. That's correct.

Q.2 In that you're supplying an extra deference to the parental objection, is that correct?

A. Yes.

• • • • • • • •

69

• • • • • • • •

Q.7 From a professional and policymaking standpoint, is it preferable to have the professionals making the determination about what type of treatment or placement is appropriate for mentally retarded persons?

A. Yes. I don't think you can ever make that decision in a vacuum from the parent because just as in the case of this young man I described at Hazelwood, he is still very dependent on his mother's availability, her communication with him and also many of the parents do—they have anecdotal knowledge of how their child has functioned over the years. Now, if

70

you listen to the parents as a body, they would say, "We know better what our child needs than any professional". And I can't totally refute that but on the other hand they also don't recognize the capability that the community has to support their son or daughter and to that extent they're not going to be willing to even consider that the professional may be right. But, yes, I think that the decisions as to where they reside should be primarily in the hands of

the professional at the facility and the community mental health center and, in fact, if you look back at our own written policies, for instance, for Oakwood when it was initiated, it clearly indicates that this is a short-term placement, developmentally modeled in which the person leaves the community, goes into a facility for from one to three or four years normally, learns everything they can learn, the basic life skills, feeding toileting, those kinds of things, develops a capacity to do some kind of daily activities that both keep them occupied and move them upward and then they would go back in the community. The reason that has fallen apart, and it fell apart long before New Neighbors actually

71

occurred, was that, pardon the reference, but I think you get something like squatter's rights once you're in there and especially if there is no community site to safely take them back out and there were some, before our time, there were some very unhappy endings to people moving summarily into the community just because, you know, Medicaid said they don't look like they qualify for ICF/MR anymore, if the community was not really ready to receive them, anything from ill health to abuse to even death occurred.

• • • • • • • •

Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, by his Mother and next friend,
MARY DOE, on behalf of himself and all
others similarly situated, - - - - - - *Plaintiff,*

v.

BUDDY ADAMS, and
JACK FARLEY, - - - - - - - - - - *Defendants.*

CLASS ACTION ORDER—Entered May 4, 1983

Upon motion of the plaintiff, the requirements of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure being met, and the Court being fully advised,

IT IS ORDERED that this action be and it is hereby certified as a class action and that the class be designed as follows:

All mentally retarded persons in the Commonwealth of Kentucky who are presently committed or who may in the future be subjected to being committed to a state hospital, institution or other mental retardation residential treatment center involuntarily on the basis of their condition or mental retardation and who contend that said involuntary commitment violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution, 29 U.S.C. Sec. 794, KRS Chapters 202A, 202B 210, and 31.

Dated 5/4/83

/s/ Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

4

DEPOSITION OF PAUL MANN

Direct Examination by Mr. Kasdan:

• • • • • • • •

Q.5 In the course of your work at Hazelwood have you become familiar with the type of residents who are in Hazelwood?

A. Yes, I have.

Q.6 All right. Could you describe for the Court the residents—the types of residents that are at Hazelwood?

A. Okay. We serve a population of profoundly severely mentally retarded developmentally disabled residents who are non-ambulatory. The non-ambulatory characteristic is a requirement to admission to our facility.

I might add that although—at least ninety percent of our population falls into the profoundly retarded category. We have a handfull of severely retarded individuals. We have also one, maybe two, if I recall, residents currently who are moderately retarded.

Q.7 Is there any way to generalize about the individuals who fall within these classifications?

A. Yeah, that's how they fall.

Q.8 I'm speaking of what their

5

abilities are based upon your observations of them at Hazelwood.

A. Yes. Typically—Our typical resident is profoundly retarded; is non-verbal; has no independent self-help-skills; is schedule trained perhaps but not toilet trained; has a very limited repertory of functional/social behaviors; tends toward self-stimulation, with self-abuse being part of that pattern; and requires environmental engineering to maintain an environmental focus rather than an austic like focus.

Q.9 Would you explain that last statement, please.

A. Self-referenced behavior, which is a generic term, including self-stimulatory behavior and other kinds of—yeah, self-referenced behavior.

• • • • • • • •

29

• • • • • • • •

Q.99 I just want you to tell us what you as a clinician feel are the problems.

A. Yeah. Mental illness, which is—about which these statutes were initially drawn it seems to me, is of a much different nature than mental retardation.

With someone who is psychotic most generally there is—there is some kind of a more or less non-psychotic reference where this person should be in full possession of their rights. When this person

30

loses the ability to act responsibly those rights are taken away, and that judgement is made in a legalistic way, as well as in a professional way. So, you're talking about a tractable illness, one that can change with doing with, treatment.

On the other hand, mental retardation is a retractable condition, one that doesn't change. People don't get better from mental retardation. They may learn to function—use the equipment they have, more or less, but mental retardation won't go away no matter how much treatment you provide.

So, an initial determination that someone is mentally retarded—if that determination is correct, you know, it is not going to change ever.

• • • • • • • •

57

• • • • • • • •

Q.214 Can it happen that a mentally retarded person—persons functional ability will improve such that they

don't require further institutionalization at some point? Can that happen?

A. It depends upon what person—what their initial starting point is. If you're talking of somebody who is—who is severe or upper severe range and above, sure, absolutely.

58

I think there's a—a legitimate question as to whether a non-ambulatory and non-verbal profoundly retarded individual would be better served in one environment or the other.

• • • • • • •

18

DEPOSITION OF KAREN MIDDENDORF

Direct Examination by Mr. Lawlor:

• • • • • • •

Q. Was that policy in existence, as you understand it, at the same time you weren't able to get this information from the institution?

A. I'm not sure when the official word of the policy came out. I know all of the sudden the

19

information dried up, and all we were able to get was sort of a . . . how can I put it . . . just very sketchy information that might say like John Doe, male, age twenty-three, and a diagnosis. We were able to get that sketchy kind of information.

We were told then that in order to . . . Let's see, I'm trying to remember how that policy came down . . . What was decided was that rather than sending out the full information on everybody, that they would . . . The facilities would have the responsibility to contact the families and tell them about the New Neighbors Program and gain their permission for further information to be shared with a district so that their son or daughter could be considered for placement.

Q. This parental objection policy that we have referred to, did it just involve residents where the parents made actual disapproval, or did you have similar problems with potential clients where the parents simply had not approved and did not actually disapprove?

A. We had both situations in our area. We had made the commitment in our district to bring back all of our folks from the facility.

26

• • • • • • •

Q. Did you make efforts to obtain referrals from the Cabinet for Human Resources?

A. Yes, there were many meetings between Ed and Bill Draper and the MR/DD directors trying to resolve these issues. Everybody was concerned about it, but it was . . . you know, just a problem.

Q. When you say Ed, is that Ed Skarnulis?

A. Yes.

Q. During this period when you couldn't get the referrals that you mentioned and your continuing problems, were you aware of these four persons you referred to earlier in your testimony?

A. Yes.

Q. And why were they not placed?

A. Because of the policy of parental permission.

• • • • • • •

41

Cross-examination by Mr. Kasdan:

• • • • • • •

Q. Could you tell us a little bit about the kind of counseling services that you provide

42

to the family of individuals who may be MR or DD?

A. Okay. It varies . . . For example, in the early childhood program, we seek to identify children as soon as

they are born or as soon as it is identified that they have a handicap and begin working with that family very, very early, number one to accept the fact that their child has a handicap; two, make them aware of the kinds of interventions that can hopefully ameliorate the degree of that handicap; or can provide them some assistance and support so that they can better accept and make a normal life for that child.

We end up sometimes . . . We tend to work more in that area. Now, when a family has a real adjustment problem that is creating some real emotional problems for them, and that kind of thing, we tend to refer them to our mental health staff, who we feel are more appropriately trained to do that kind of in depth counseling.

But we do counsel in terms of the kinds of things that we can do to intervene, options parents have, and the kinds of supports that we can give them to make it easier for them to keep their child at home.

And then with adults it is the same kind of thing. Often what we get into with parents of adults is having to counsel them in terms of letting go a little bit, of not over-protecting, of recognizing that their child, as they perceive them, is now an adult and needs to be doing adult kinds of things. We get into that kind of counseling.

Q. With regard to the historical perspective of the flow into and out of institutions of MR/DD people, have you seen any changes in that flow back and forth since you have been a Director of MR Services?

A. The major change is that we have not, to my knowledge, had anyone go into a state facility for at least five, probably six years from our district. We have made a commitment that that is absolutely the last, last option, that we will just do anything possible to provide the supports the family needs to provide the support in the community. And only as an absolute last option will we recommend facility placement for anyone from our district.

• • • • • • •

Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al., - - - - - - - - - *Plaintiffs,*

v.

BUDDY ADAMS, and
JACK FARLEY, - - - - - - - - - - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

This case is submitted to the Court on the motion of the plaintiff, Samuel Doe, for partial summary judgment against defendant Buddy Adams. Plaintiff is a mentally retarded person who has been institutionalized at Outwood for over ten years.

This action was brought on his behalf by his mother and next friend who contends that the defendant has refused to make available the pre-commitment and post-commitment procedural safeguards guaranteed under KRS 202A and 202B. More specifically, plaintiff alleges that every mentally retarded person who is committed to a Mental Retardation Residential Treatment Center (hereinafter MRRTC) may not be committed without a determination that he is mentally retarded, that he is a danger to himself or others, and that the least restrictive mode of treatment for that person requires placement in a hospital, institution or other MRRTC.

The Complaint notes that KRS 202B.050 provides: "All rights guaranteed by KRS Chapter [ ] 202A . . . to mentally ill persons shall apply to mentally retarded persons." Plaintiff further contends that defendant has complied with the provisions of KRS 202A, 203 and 902 KAR 12.010, insofar as the mentally ill are concerned, but has denied the mentally retarded those rights.

Plaintiff also contends that he has been denied his rights under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment as well as his rights under 29 U.S.C. §794, KRS 202A, KRS 202B, KRS 210, and KRS 31.

Extensive depositions have been taken by the plaintiff and establish without contradiction that the mentally retarded, whether admitted by their parents or by a guardian related to them, or by a statutory guardian who is not related to them are admitted to the MRRTC without the benefit of any court hearing. Instead, upon the decision made by the defendant that the person for whom admission is sought is mentally retarded, such a person is admitted.

The undisputed evidence reflects that in the past few years, in only three cases concerning mentally retarded persons was a civil commitment proceeding instituted, and only one case in the last year. Is is also shown that approximately 1,100 petitions for involuntary commitment of mentally ill persons are filed yearly in Jefferson County alone; but since July 1982, not one case involving a mentally retarded person has been subject to the KRS 202B procedure.

The written admissions' policy of the defendant conditions admission on (a) the availability of appropriate alternative residential and training programs in the community, (b) the availability of appropriate training and living space within the recommended facility, (c) the severity of the applicant's handicap, and (d) the status of the family situ-

ation. These standards of admissibility are administered by the Records Review Committee (hereinafter RRC), a committee composed of various state employees, one of whom is a psychiatrist, with Dr. Susan Turner as chairperson for the past four years.

With respect to the confinement and release of persons placed in a MRRTC, it appears that the defendant, as a result of pressures from some parents of mentally retarded persons, has instituted an unwritten policy which gives to the parents of a mentally retarded person an absolute veto power the decision of the Committee, appointed by the MRRTC, to determine whether a mentally retarded person is suitable for release from a state MRRTC facility to alternative community placement.

This case is sequel to *Kentucky Association For Retarded Citizens* v. *Conn*, 510 F.Supp. 1233 (W.D. Ky. 1980), *aff'd*, 674 F.2d 582 (6th Cir. 1982), *cert. denied sub. nom.*, *Bruington* v. *Conn*, ___ U.S. ___, 103 S.Ct. 457 (1982). In *Conn.*, among other holdings, the Court held that persons who are confined at MRRTC, Outwood, are, in fact, involuntary admissions with the exception of those very few who made their own applications to be admitted, and are entitled to the least restrictive alternative mode of treatment. *Id.* at 1235; 1249. We did not reach in that case, however, the question of whether a mentally retarded person had to go through a civil commitment proceeding prior to confinement in Outwood or in any other MRRTC.

Plaintiff contends, with regard to the admissions' policy of the defendants, that all persons who are in MRRTCs are involuntarily committed and that they must be accorded the same rights as are accorded to involuntarily committed mentally ill persons under the provision of KRS 202A. More specifically, plaintiff contends that no mentally retarded persons may be committed except under KRS 202B.040, and that once a person is committed, there must be

reauthorization of commitment at least every 360 days; and further that if, at any time, the resident no longer meets the standards of commitment, he is entitled to release.

To bolster that contention, plaintiff argues that the doctrine of collateral estoppel must be applied to our holding in *Kentucky Association For Retarded Citizens* v. *Conn, supra,* and that every person is a MRRTC is involuntarily committed. Plaintiff also relies upon the provisions of KRS 202B.050 which provides that all rights guaranteed by KRS 202A and 210 to mentally ill persons shall apply to mentally retarded persons.

We proceed first to resolution of the collateral estoppel issue. The leading case on that issue is that of *Parklane Hosiery Co., Inc.* v. *Shore,* 439 U.S. 322 (1979), where the Supreme Court held that a party who had issues of fact adjudicated adversely to it in an equitable action could be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party. In *Parklane,* the Supreme Court noted that collateral estoppel could only be applied against parties who had a "full and fair" opportunity to litigate their claims. *Id.* at 332.

Since *Parklane, supra, Hardy* v. *Johns-Manville Sales Corporation,* 681 F.2d 334 (5th Cir. 1982), states that in order for collateral estoppel to be invoked, the issue to be concluded must be identical to that in the prior action, it must have been actually litigated, and the determination made in the issue in the prior action must have been necessary and essential to the resulting judgment. *Id.* at 341.

Further, as stated in *Hardy* at 341, "[i]f it appears that a judgment may have been based on more than one of several distinctive matters in litigation and there is no indication which issue it was based on or which issue was fully litigated, such judgment will not preclude, under the

doctrine of collateral estoppel, relitigation of any of the issues." (citing authorities).

In *Conn, supra,* the plaintiffs sought to prevent the defendants from constructing a new facility for 175 mentally retarded citizens. They also alleged violation of the Fourteenth Amendment by denial of the "right to treatment, right to the least restrictive alternative, and right to freedom from harm." *Id.* at 1237. At 1247, 48-49, the Court was concerned with the question of whether state law forbid the construction of the new Outwood; and if it did not, what were the rights of those people who would be residents of the new Outwood or who were residents of the old Outwood.

After holding that Kentucky did not ban the use of construction of new facilities for the treatment and care of mentally retarded persons, the Court went on to analyze the rights of persons who would be or who were confined at Outwood. We noted that KRS 202B.040 provided for a court determination before any person who was mentally retarded could be involuntarily committed. On pp. 1248 and 1249, the Court stated its belief that commitments of mentally retarded persons who were confined at Outwood were, in fact, involuntarily confined, with the exception of those very few who made their own applications to be admitted. The Court went on to hold that those few who were truly voluntary residents were entitled to release on their own requests.

In the judgment, the Court specifically declared that each resident confined at Outwood or to be confined at the new Outwood would be considered to be involuntarily committed, with the exception of those adult individuals who applied voluntarily. The judgment went on to state that the voluntarily confined residents were entitled to be discharged upon their application for discharge, and that the other residents were entitled to seek relief from actions approved by their guardians or committees for or against admission and discharge. *Id.* at 1235.

The Court went on to state in the judgment that each resident committed by the action of a guardian or committee is entitled to the rights set out in K.R.S. 202B.040 and 202B.060, and to release where a determination is made by an interdisciplinary team that the resident presents no immediate danger or threat of danger to self or others, and where the least restrictive alternative mode of treatment is in a living facility, and where there is in existence such a facility which can adequately treat and supervise the residents. *Id.* at 1235.

The Court has reviewed the briefs of the parties and in applying the doctrine of collateral estoppel, we note that the issue raised in the case at bar, relative to the allegedly improper admission of mental retarded persons, is not identical to the issue raised in *Conn*, and which the Court discussed, which was the right to the least.

It is noted at p. 1248, the Court was basically concerned with involuntary commitment in the context of the right to the least restrictive mode of treatment. The Court did not specifically determine that all mentally retarded persons were entitled to the protections associated to involuntarily committed mentally ill persons, or the protections set out in KRS 202B.040; but simply reached the decision that there was no merit to the argument made by the defendants that retarded persons were voluntary residents of MRRTCs and were not entitled to the least restrictive mode of treatment.

Believing that collateral estoppel does not bar the Court from in independent determination as to what the rights of mentally retarded persons are in the context of their admission to MRRTCs, we hold first that KRS 202B.050 and KRS 202B.020 mandate the hospitalization for the care and treatment of mentally retarded persons are to be provided in the same manner as hospitalization of mentally ill persons, as set forth in KRS 387, 210, 202A.020, 202A.231

and 202A.201; except that when a court appoints persons to examine allegedly mentally retarded persons, such persons, where possible, shall have made a study of mental retardation. Also, there is an exception that a qualified mental retardation professional may be substituted for one, but not both positions when certification is required for involuntary hospitalization. See KRS 202B.020.

KRS 202A.021 speaks in terms of voluntary admissions and allows any adult to be voluntarily admitted to a hospital upon his own application by an authorized physician. Any unemancipated person under 18 may be admitted to a mental hospital following his application signed by parent or guardian. Any child between the ages of 14 and 18 may admit himself or herself to a mental hospital, provided that the child's parent or legal guardian are notified immediately of the admission.

KRS 202A.021, (2), (3), and (4) allow a physician to discharge any voluntary patient, including anyone under 18 years of age, whose hospitalization he believes to be no longer necessary. In the alternative, if the voluntary patient request release, or if a child represented by a parent or committee requests release, or has a release requested by his parent or committee, he must be released unless further detained under other provisions of the statute. Also, at any time during the period of hospitalization, either the child or his parents or legal guardian may seek an independent medical review of the appropriateness of the decision to continue his confinement or to release him.

Since KRS 202B.020 specifically provides for hospitalization of mentally retarded persons by the same procedures as those set out in KRS 202A.021, it is readily apparent that any mentally retarded person under 18 years of age may be admitted by his parents or guardian, and that such admission in the eyes of the Legislature was to be treated as analogous to a voluntary admission.

We note in this connection that in the case of *Secretary of Public Welfare of Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979), the Supreme Court described the placing of mentally retarded and mentally ill children under 18 by application of their parents or guardians as being application for voluntary commitment. *Id.* 646, 47.

Our conclusion that the Legislature did not intend that all mentally retarded persons who were placed in MRRTCs should be considered as being involuntarily committed is fortified by the fact that KRS 202B.040 specifically refers to the due process procedures to be followed in the event of a mentally retarded person who was involuntarily committed. That section tracts the language found in KRS 202A.026. When KRS 202B.040 is considered, along with KRS 202B.020 and KRS 202A.021, it is apparent that the Legislature wished to differentiate between persons whom the authorities felt, for some reason, should be hospitalized in a MRRTC in the absence of an application by the guardian, committee or parents.

Analyzing further KRS 202A.021, it is significant to note that the only restrictions placed upon the admission of a child whose application is signed by a parent or guardian is that an authorized staff physician must grant permission for the admission. The statute then makes ample provision for the due process rights of the mentally ill person to be discharged at any time, since that decision may be accomplished by either the decision or a physician or the decision of the parents or guardian, unless the hospital authorities think release inadvisable, in which case the provisions for the involuntary confinement are brought into play.

We conclude, with respect to admissions, that the defendants are not violating the Equal Protection Clause of the Fourteenth Amendment. The mentally retarded person or child may not be confined in a MRRTC without the

approval of an Admissions Committee, which must consider the four criteria for admissions referred to on pages 2 and 3 of this opinion. Since that Committee has as one of its employees a psychiatrist, we believe that admission by it may be considered as equivalent to the admission of mentally ill persons by an authorized staff physician.

The Court notes that the only standard imposed upon the staff physician in KRS 202A.021 inferentially is that the person who has applied for admission is mentally ill or has symptoms of mental illness. While we would prefer, in light of *Parham* v. *J.R.*, *supra*, that the committee be composed entirely of physicians, we not that in *Secy. of Public Welfare* v. *Institutionalized Juveniles*, *supra*, the mentally retarded children are admitted to the hospital on the application of parents or guardian, and the referral of a physician, accompanied by a medical or psychological upon the Director of the hospital the duty of making an independent examination of the child; and if the disagrees with the referring physician, the child must be discharged. If the child is admitted, then a staff conference is held and it is decided whether or not the child needs hospitalization.

Finally, we note that there is a class of mentally retarded persons who are, generally speaking, adults and who are committed to MRRTCs upon the application a State-appointed guardian, such as Maxine Pulliam. See *Conn*, *supra*, referring to the fact that 155 persons were admitted to Outwood as a result of an application filed by Maxine Pulliam, an employee of the State. The Supreme Court addressed this problem in *Parham*, *supra*, at pp. 617-19, where they stated that: although there are differences in the situation of persons who are wards of the State at the time of admission, as contrasted with the situation of children who have natural parents requesting admission, these differences are no so great as to require different procedures at the time of the child's initial admission to the hospital. The Court went on to state that there was no

evidence that the State's application for admission was submitted for reasons unrelated to the child's need for treatment. *Id.* at 618.

We note the similarities between the procedures now employed by the defendants for the admission of mentally retarded persons and those employed for the voluntary admission of adults and children as provided in KRS 202A.021, KRS 202B.020 and KRS 202B.050.

We note also that KRS 202A.171 requires the discharge of an involuntary patient when he no longer meets the criteria for involuntary hospitalization. No specific reference is made in KRS 202B.020 and KRS 202A.171. However, since KRS 202B.050 guarantees the rights of KRS 202A to mentally retarded persons, it follows that an involuntary mentally retarded person must be discharged when he no longer meets the criteria for confinement set out in KRS 202B.040. Again, that type of proceeding and relief would apply only to the very small number of mentally retarded persons who are not admitted by the application of either a natural parent or a guardian and would not apply to the great majority who are considered to be voluntarily confined.

Finally, we note that the policy of the defendant, allowing parent an absolute veto power over the decision of the Release Committee to place a mentally retarded person in the community, is in conflict with the holding in *Parham* v. *J.R., supra.* In *Parham,* the Court held that its precedent allowed parents to retain a substantial, if not dominant, role in the decision to voluntarily admit their children to mental hospitals. The Court also concluded that the child's rights and the nature of the commitment decision are such that the parents cannot always have absolute and unreviewable discretion in deciding whether to have a child institutionalized. Of course, they retain plenary authority to seek such care for their children, subject to a doctor's

independent examination and medical judgment. See 442 U.S. at 604.

The amicus curiae relies upon the most recent decision in *Halderman* v. *Pennhurst State School & Hospital,* 707 F.2d 702 (3rd Cir. 1983). In that case, a two-to-one decision was entered holding that the district court erred when it held that a mentally retarded person could be transferred from Pennhurst, the state institution for the mentally retarded, where he had resided for over nine years, to a community living arrangement (hereinafter CLA). The district court had mandated that individual habilitation plans (IHPs) be developed supporting the transfer of Pennhurst School age residents to CLAs. Parents were allowed to participate as members of their child's IHP team, but parental consent to a transfer was not required. The IHP was to be submitted first to a court appointed master; and if the parents objected to the recommendations of the IHP, they could demand a hearing to determine whether the Pennhurst arrangements were more beneficial to the resident's habitation than the living arrangements in the community. The master would then make a report which could be excepted to by the parents and then heard by the district court.

Circuit Judge Aldisert, who wrote the majority opinion, held that the "district court did not afford to the parents' views the consideration that the Constitution demands." *Id.* at 711. Judge Aldisert stated that parents have a substantial right to direct the upbringing of their minor children, which can only be overcome either by a showing of abuse or neglect or by proof of a significant governmental interest running counter to the express parental desires. He then went on to hold that since there was evidence, both for and against the transfer decision, there was insufficient proof of a significant governmental interest to negate the parents' substantial constitutional rights. *Id.* at 710.

Circuit Judge Rosenn, in his concurring opinion, stated that he believed that when "parents' interests clearly collided with the interest of their minor child, whatever authority parents may ordinarily possess is necessarily subordinated to the child's best interest, notwithstanding the recognized right of parents in the well-being of their children." *Id.* at 712.

Judge Rosenn went on to hold that although the parents did not have an absolute right in the case, the master should have ordered a transfer only if there were a compelling justification for the transfer. He based his opinion, in part, upon the discussion in *Parham* v. *J.R.*, *supra*, to the effect that there is a fundamental presumption that parents act in the best interest of their children, quoting *Parham*, 442 U.S. at 602.

In his dissenting opinion, Circuit Judge Sloviter pointed out that where the parents have voluntarily relinquished custody of a child to a mental retardation facility, the parental constitutional right referred to by Judge Aldisert could not govern the decision in *Halderman, supra*. He also pointed out that *Parham, supra*, requires some kind of inquiry by a neutral fact-finder to determine whether the statutory requirements for admission are satisfied, citing 442 U.S. at 606. Again, as Judge Sloviter noted, the parents did not have the final decision-making authority when the child's liberty interest was at stake.

Also, as Judge Sloviter pointed out, the court was concerned with the child's separate constitutional rights, and the court could not necessarily rely upon the parental authority to vindicate the child's independent interest. However, the parents should be given a full opportunity to show that interest in the decision was congruent with the child's best interest and right.

We believe that this analysis of *Halderman, supra*, reflects that even Judge Aldisert did not take the view that

parents have an absolute veto power over the decision of a neutral fact-finder to release a mentally retarded child. It it true though, as pointed out by Judge Sloviter in his dissent, that although both Judge Aldisert and Judge Rosenn disclaim that the right of the parents to an absolute veto, they in effect held that one existed.

This Court's analysis of *Parham, supra*, and *Halderman, supra*, results in our holding that the defendants cannot allow parents to veto a decision made by a neutral committee or decision-maker as to the release of their child, although the committee certainly must give much weight to the opinions of the parents and to their part in the process of determining whether the child should be transferred.

A partial summary judgment in accordance with these findings of fact, conclusions of law has been entered this day.

Dated 3/28/84

/s/ Charles M. Allen
Charles M. Allen, Chief Judge.

cc: Counsel of Record

Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al., - - - - - - - - - *Plaintiffs,*

v.

BUDDY ADAMS, and
JACK FARLEY, - - - - - - - - - *Defendants.*

PARTIAL SUMMARY JUDGMENT

Plaintiff, having moved for partial summary judgment, and the Court, having reviewed the briefs of the parties, the depositions and papers on record, and being fully advised in the premises, and having filed its findings of fact, conclusions of law and memorandum opinion,

IT IS ORDERED AND ADJUDGED that the motion for partial summary judgment be and it is hereby denied insofar as it pertains to plaintiffs' claims that mentally retarded persons should not be placed in Mental Retardation Residential Treatment Centers (MRRTC) without a court determination of dangerousness and mental retardation, and that the least restrictive alternative mode of treatment for that person requires placement in a hospital, institution or other MRRTC.

IT IS FURTHER ORDERED AND ADJUDGED that the motion for partial summary judgment, insofar as it pertains to the policy of the defendants in allowing parents an absolute veto power over the decision of the Release Committee to

place a mentally retarded person in the community is sustained.

IT IS FURTHER ORDERED AND ADJUDGED that this is not a final and appealable judgment.

Dated 3/28/84

/s/ Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al., - - - - - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human Resources, et al., - - - - - - - *Defendants.*

MEMORANDUM OPINION—Entered Jan. 9, 1986

This action is submitted to the Court on the plaintiffs' motion for reconsideration pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Plaintiffs seek reconsideration of that portion of this Court's March 28, 1984, memorandum opinion and order which denied plaintiffs' claims regarding the admissions process to Mental Retardation Residential Treatment Centers [hereinafter "MRRTC"]. More specifically, plaintiffs' motion requests the Court to make available to the mentally retarded the procedural protections established for them by state statute. Defendants, on the other hand, move for partial summary judgment in their favor on the same issue.

The record reveals that approximately 800 mentally retarded persons are confined in MRRTCs. Of these 800 persons, 100 are moderately or mildly retarded, 222 are severely retarded, and 487 are profoundly retarded. Plaintiff, Samuel Doe, was placed at the Outwood State Hospital at the age of eighteen under the authority, care and custody of the Secretary of the Kentucky Cabinet [formerly "De-

partment"] for Human Resources. Several years after he had become a resident, he was adjudicated incompetent in 1976 at the initiation of the state. Soon thereafter, his mother, Mary Doe, was appointed legal guardian. He now has been subjected to confinement for over thirteen years.

The record also reveals that the criteria for admission to a mental retardation facility is determined by (a) the availability of appropriate alternate residence and training programs in the community, (b) the availability of appropriate living and training space within the recommended section, (c) the severity of the applicant's handicap, and (d) the status of the family situation. In addition, it is the custom of the defendants to consider an admission voluntary if the retarded person signs what is known as a bill of rights form. The record reveals that if the retarded person is unable to understand the procedures of admission, the procedure is explained to the family accompanying him. If the family agrees to it, and if the individual signs the application with an x or is able in any other way to let the defendants know whether he or she wants to be admitted, then that individual is considered a voluntary admission.

The record further reveals that no civil proceedings with regard to admissions have ben instituted. The defendants consider this appropriate because they believe that nearly all admissions are voluntary rather than involuntary. The record also reveals that only two court proceedings have taken place with reference to a resident's request for release.

The plaintiffs' brief in support of reconsideration points out that this Court, in effect, previously focused erroneously on the constitutionality of the defendants' informal admission system rather than on the constitutionality of the class members' exclusion from the statutory system provided by KRS 202B. Plaintiffs emphasize that they are not challenging the constitutionality of KRS 202A or 202B,

but rather, are challenging the rights of the state under due process and equal protection considerations. Likewise, plaintiffs correctly note that in *Kentucky Association for Retarded Citizens* v. *Conn*, 510 F.Supp. 1233 (W.D. Ky. 1980), *aff'd*, 674 F.2d 582 (6th Cir.), *cert. denied*, 459 U.S. 1041 (1982), this Court held that the great majority of profoundly and severely mentally retarded persons are simply incapable of making decisions as to whether it is in their best interest to be placed in a MRRTC.

In light of the holdings in *Parham* v. *J.R.*, 442 U.S. 584 (1979), and *Secretary of Public Health of Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979), we have little doubt that the state may constitutionally provide for the admission of mentally retarded persons, at least with respect to minority patients, the informal procedures which are now used by the state in admitting nearly all patients. However, in the instant case, the Commonwealth of Kentucky did not choose to legislate for procedures similar to those discussed in *Parham* and *Institutionalized Juveniles*. Instead, the legislature chose to guarantee to mentally retarded persons all of the rights guaranteed to mentally ill persons by KRS 202A and 210. Having created these due process rights, the question is whether the state may deny them by resorting to practices and procedures which are not in accord with the practices and procedures afforded to mentally ill persons.

As previously mentioned, plaintiffs are attacking the defendants' informal procedures as a violation of due process and equal protection. With respect to due process, plaintiffs rely, *inter alia*, on *Cleveland Board of Education* v. *Loudermill*, 105 S.Ct. 1487 (1985), *Mills* v. *Rogers*, 457 U.S. 291 (1982), and *Vitek* v. *Jones*, 445 U.S. 480 (1980), as well as this Court's opinion in *Karc*, for the proposition that once the mentally retarded have a liberty interested created by the state, the state cannot extinguish it by failing to follow

its own legislative due process procedures. While this Court believes that the plaintiffs have been granted a liberty interest by KRS 202A and 202B as well as by the holdings in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), *Vitex* v. *Jones*, *Karc*, and *Association for Retarded Citizens* v. *Olson*, 561 F.Supp. 473 (D. N.D. 1982), none of the plaintiffs' cases on the due process issue reached the result contended for by the plaintiffs, viz., what due process should be extended to the plaintiffs once a court has reached the conclusion that they posses a state created liberty interest.

In *Vitek* v. *Jones*, although the Court approved of the specific due process procedures set out by the district court, it did not in any way state that these procedures were the same as those set out for non-prisoners who were involuntarily confined to a mental hospital. In *Loudermill*, the Court stated that "once it is determined that the Due Process Clause applies, 'the question remains what process is due.' " 105 S.Ct. at 1493 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). The answer to that question, according to the Court, was "not to be found in the Ohio statute." *Id.*

In conclusion, we believe that although a liberty interest is created in the plaintiffs with regard to so-called voluntary admissions, the procedures followed by the state are sufficiently analogous to those followed in *Parham* and *Institutionalized Juveniles* to meet the requirements of procedural due process.

Although the plaintiffs cannot prevail upon the due process issue, they to prevail upon the equal protection issue. Kentucky has explicitly provided that mentally retarded persons shall have the same due process rights as mentally ill persons. In *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), a prisoner named Baxstrom was certified as insane by a prison physician and transferred to a prison mental hospital. Later, when his penal sentence was about to expire, the State of New York civilly committed him fol-

lowing a proceeding in the chambers of a Surrogate, at which Baxstrom appeared alone. Medical certificates were filed by the state and indicated that two examining physicians believed Baxstrom was still mentally ill and in need of institutional care. The Surrogate signed a certificate which indicated he was satisfied that Baxstrom would require care and treatment in an institution for the mentally ill. Following that hearing, Baxstrom was retained at the state prison mental institution.

Under New York law, all persons civilly committed because of mental illness were granted the right to a jury trial, except those who were committed at the expiration of a penal term. The Supreme Court held that Baxstrom's equal protection rights were violated because all persons who were mentally ill should have been granted the right to a jury trial and no rational basis existed for distinguishing between persons who had been confined in prison and those who had not been so confined. The Court also held that the state did not have the right to deny Baxstrom a judicial proceeding to determine whether he was dangerous and should be confined in a prison rather than in a civil mental institution.

In *Jackson* v. *Indiana*, 406 U.S. 715 (1972), Jackson was a mentally defective person who had been charged with two robberies. After a competency hearing was held by the court to determine whether Jackson could stand trial, the court ordered him committed to the Department of mental Health until such time as the department would certify that he was sane.

The Supreme Court held that Jackson was deprived of equal protection because the Indiana statutes for commitment of mentally ill or "feeble-minded" persons afforded protections which were not available or granted to Jackson when he was committed under Indiana's pretrial commitment statute for incompetent criminal defendants. Under

this statute, a court could find that a person was incompetent to stand trial and therefore should be confined to a mental institution without any statutory provision for periodic review of the defendant's condition or opportunity for release. In the words of the Court, "by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by condemning him to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by [Indiana's other two commitment statutes], Indiana deprived [Jackson] of equal protection of the laws under the Fourteenth Amendment." *Id.* at 730.

Here Kentucky has decreed by legislative fiat that the mentally ill and the mentally retarded are to be treated alike with minor exceptions. Having declared that they shall be treated in the same manner, we believe that it is a violation of equal protection for the defendants to treat them differently.

The problem is the case at bar is created primarily by the legislature's sweeping determination in KRS 202B.050, which states that "[a]ll rights guaranteed by KRS Chapters 202A and 210 to mentally ill persons shall apply to mentally retarded persons." With this provision in mind, we must examine the provisions of KRS 202A and compare them with the practices and procedures of the defendants in construing Chapter 202B.

KRS 202A.021 provides that an authorized staff physician may admit for observation, diagnosis, care and treatment any person who is mentally ill or who has symptoms of mental illness and who applies voluntarily therefor. The practice followed by the defendants allows voluntary admissions for mentally retarded persons as previously outlined. These procedures are analogous to the procedures which the state defendants follow in admitting mentally

retarded persons whom they contend are voluntarily committed. Also, the provisions contained in KRS 202A.021(1) allow children under eighteen who are mentally ill or who have symptoms of mental illness to be admitted provided the child's parents or guardian apply for admission and sign the application in the presence of two witnesses. A child fourteen years of age or older may admit himself or herself to a hospital for evaluation with the consent of a treating or admitting physician, provided that the child's parents or legal guardian are notified immediately of the admission and of their right to seek discharge.

We believe that insofar as mentally retarded persons under eighteen years of age are concerned, they are granted substantially the same rights by the defendants in the practices and procedures which they now follow. In other words, they are admitted upon the application of their parents or guardian and upon the recommendation of the Records Review Committee, which includes at least one psychiatrist.

We also believe that the defendants may admit mentally retarded person who are mildly or moderately retarded and who are over eighteen where those persons in their individual capacities make an application to be admitted to a mental retardation facility, but not in those instances where the application is made by parents, guardians, committee or at the instance of the state.

Finally, we believe that as to those persons who are profoundly or severely retarded and who are over the age of eighteen, the state defendants may not follow the procedures now used. Those persons must be considered as involuntarily committed even though the procedure now followed is called a voluntary admission and even though the so-called voluntary admittee signs the form prescribed by the state defendants. All of these persons, regardless of the wishes of their parents, guardians or the RRC, are

entitled to the privileges set out in KRS 202B.040 and may not be committed unless a court makes the determinations required under that statute.

While KRS 202B does not delineate the specifics as to how and when the determination is to be made, KRS 202A.041 requires a preliminary hearing by the court within five days from the date of arrest of a suspected mentally ill person and then a final hearing within twenty-one days of the date of arrest to determine if the person should be involuntarily hospitalized for a period of sixty days. In addition, KRS 202A.071 and .076 require a preliminary hearing not less than six days from the date of the mentally ill person's detention and a final hearing within twenty-one days from the date of detention with a jury unless the mentally ill person and his or her attorney waive the right to a jury trial.

It is of course obvious that the great majority of mentally retarded persons who are profoundly or severely retarded are not brought for admission to MRRTCs as the result of an arrest. However, as it is typically the decision of parents or guardian to have the mentally retarded person admitted and as that decision then triggers the application procedure, it would seem that the date of application and actual admission, which are usually the same, should be considered as analogous to the date on which arrest occurs in the case of a mentally ill person. With that in mind, it would seem that in order to provide equal protection to the profoundly and severely retarded, the procedures set out in KRS 202A.071 and .076 must be followed.

The plaintiffs have wisely recognized that it will not be easy for the defendants to meet immediately the burdens which this decision places upon them. Therefore, the Court believes that the plaintiffs' suggestion of a sixty day continuance should be granted in order for the parties to work out the details of the procedures to be followed for pro-

foundly and severely retarded persons who are over eighteen years of age.

Finally, we note defendant's argument that any orders entered by the Court requiring them to follow the state procedures advocated by the plaintiffs would result in a violation of the Supreme Courts mandate in *Pennhurst State School and Hosp.* v. *Halderman*, 465 U.S. 89 (1984). *Pennhurst* holds that a federal court may not grant injunctive relief against state officials on the basis of state law, whether prospective or retroactive. In interpreting the Eleventh Amendment, the Court stated:

A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater instrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. *Id.* at 106.

In the case at bar, it is true that the state defendants are not following the dictates of their own statutes. However, this Court's grant of relief is not predicated upon that finding, but rather upon the constitutional principle of equal protection, that is, that a state may not deprive its citizens of the equal protection of its laws by unevenly and discriminatorily applying them.

Therefore, we have this day entered a partial summary judgment in accordance with this opinion.

/s/ Charles M. Allen,
Charles M. Allen, Senior Judge

cc: Counsel of Record

Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al., - - - - - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human Resources, et al., - - - - - - - - *Defendants.*

PARTIAL SUMMARY JUDGMENT

—Entered Jan. 9, 1986

The Court having entered its memorandum opinion, and being fully advised in the premises.

IT IS ORDERED AND ADJUDGED that as to those persons who are over the age of eighteen years and who are profoundly or severely retarded, the defendants may not admit said persons to mental retardation residence treatment centers unless the procedures set out in KRS 202A.071 and 202A.076 are followed.

IT IS FURTHER ORDERED, however, that this judgment shall not take effect for a period of sixty (60) days, during which time the parties shall meet together for the purpose of working out, if possible, a solution to the problem created by this partial judgment.

IT IS FURTHER ORDERED that any part of the Court's March 28, 1984 opinion and order which are in conflict or inconsistent with the Court's memorandum opinion of this date and the partial judgment of this date be, and they hereby are, set aside.

This is not a final and appealable judgment.

Dated January 8, 1986

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

86 RS BR 1668/HSCS

[COMMONWEALTH OF KENTUCKY LOGO]
GENERAL ASSEMBLY
COMMONWEALTH OF KENTUCKY
REGULAR SESSION 1986

STATE COMMITTEE SUBSTITUTE FOR
HOUSE BILL NO. 477

TUESDAY, FEBRUARY 18, 1986

Committee on Judiciary-Civil reported the following bill which was ordered to be printed.

(4)[~~(3)~~] "Qualified mental retardation professional" means:

(a) A psychologist licensed under the provisions of KRS Chapter 319, who has either one year of specialized training for work with mentally retarded persons or one year of clinical experience with mentally retarded persons;

(b) A licensed registered nurse with a master's degree in psychiatric nursing from an accredited institution,with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one year of specialized training for work with mentally retarded persons;

(c) A certified social worker licensed under the provisions of KRS Chapter 335 or accredited by the academy of certified social workers, with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one year

of specialized training for work with mentally retarded persons;

(d) A psychologist with a master's degree from an accredited institution who has been awarded a certificate of qualification by the Kentucky board of examiners of psychologists under the provisions of KRS Chapter 319, with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one year of specialized training for work with mentally retarded persons; and

(e) Other professional persons with similar training and experience who are qualified according to regulations promulgated by the secretary to participate in 72-hour involuntary hospitalization procedures under this chapter.

(5)[~~(4)~~] "Resident" means a person under care or treatment in a mental retardation residential treatment center pursuant to the provisions of this chapter;

(5) All terms defined in KRS Chapter 202A shall have the same meaning when used in this chapter.

Section 2. KRS 202B.040 is amended to read as follows:

When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:

(1) He is a mentally retarded person;

(2) He presents (a) danger or a threat of danger to self or others;

(3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center; and

(4) Treatment that can reasonably benefit the individual is available in the hospital or mental retardation residential treatment center.

(5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered and involuntary commitment under this section, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in KRS 202B.010 and the subsequent admission fully complies with the provisions of KRS Chapter 202B.

Section 3. KRS 202B.050 is amended to read as follows:

All rights guaranteed by KRS Chapters 202A *(other than those rights enumerated in KRS 202A.026 and 202A.051)* and *KRS Chapter* 210 to mentally ill persons shall apply to mentally retarded persons.

SECTION 4. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Admission:

(a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires development nursing services and a planned program of active treatment;

(b) The interdisciplinary team shall:

1. Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factors; and

2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

(d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and

(e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall:

(a) Offer counseling to parents or guardians who request the release of a resident concerning the advantages and disadvantages of the release;

(b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and

(c) Prepare and place in the resident's record a summary of findings, progress, and plans.

Section 5. Whereas, Kentucky is currently under a federal court order relating to admissions to mental health facilities, an emergency is declared to exist, and this Act shall become effective upon its passage and approval by the Governor.

Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

SAMUEL DOE, et al., - - - - - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human Resources, - - - - - - - - - - *Defendant.*

MEMORANDUM OPINION—Entered November 20, 1986

This action is presented to the Court on the motion of the Plaintiff for preliminary injunction and summary judgment, and on the motion of the Defendant for the Court to reconsider its opinion and partial summary judgment of January 9, 1986.

Since the opinion of January 9, 1986 was rendered, the Kentucky legislature amended K.R.S. Chapter 202B dealing with the commitment of mentally retarded persons. 1986 Ky. Acts ch. 79 (HB 477) at pp. 162-63. These amendments became effective on March 6, 1986 when approved by the Governor. Prior to the enactment of the amendments, the statute provided that "[a]ll rights guaranteed by K.R.S. Chapters 202A and 210 to mentally ill persons shall apply to mentally retarded persons." K.R.S. 202B.050 (1982). These rights included the procedural due process right to a preliminary and final judicial hearing in a district court of the Commonwealth of Kentucky to determine whether the mentally retarded individual should involuntarily be hospitalized in accordance with the applicable statutory criteria. K.R.S. 202A.051 and K.R.S. 202B.040 (1982).

The 1986 amendments (HB 477) effectively eliminated the rights of mentally retarded persons to a judicial hearing prior to involuntary commitment. K.R.S. 202B.050, as amended, reads as follows:

> All rights guaranteed by K.R.S. Chapters 202A (other than those rights enumerated in K.R.S. 202A.026 and 202A.051) and K.R.S. Chapter 210 to mentally ill persons shall apply to mentally retarded persons. *Id.*

Furthermore, a new subsection (5) was added to K.R.S. 202B.040 (1986), which now reads as follows:

> When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:
>
> (1) He is a mentally retarded person;
>
> (2) He presents a danger or a threat of danger to self or others;
>
> (3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center;
>
> (4) Treatment that can reasonably benefit the individual is available in the hospital or mental retardation residential treatment center; and
>
> (5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in K.R.S. 202B.010 and the subsequent admission fully complies with the provision of K.R.S. chapter 202B.

Thus, the statute now contemplates that many, if not most, commitments of the mentally retarded shall not even be

considered involuntary. A new section, K.R.S. 202B.045 (1986), spells out the requirements for admission and discharge:

> (1) Admission:
>
> (a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment;
>
> (b) The interdisciplinary team shall:
>
> 1. Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factors; and
>
> 2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;
>
> (c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;
>
> (d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and
>
> (e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall:

(a) Offer counseling to parents or guardians who request the release of a resident concerning the advantage and disadvantages of the release;

(b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and

(c) Prepare and place in the resident's record a summary of findings, progress, and plans.

Finally, the amendments define the "interdisciplinary team" as:

> the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker, and other professionals, at least one (1) of whom is a qualified mental health professional, and may include the resident, the resident's family, or the guardian.

It will be recalled that, with regard to the statutory scheme in effect from 1982 until 1986, the previous opinion of the Court held that because it granted equal due process rights prior to involuntary commitment to both mentally retarded and mentally ill persons, the Commonwealth could not apply the statutes in a different way to these two classes of persons and thereby deprive the mentally retarded of their equal protection rights. The decision also held that it would not be a violation of the due process rights of mentally

retarded persons for the state to commit such persons to mentally retarded institutions (hereinafter MRI) without a judicial hearing.

The Court, in that portion of the opinion relating to due process, relied heavily upon the decision of the Supreme Court in *Parham* v. *J.R.*, 442 U.S. 584 (1979). However, we have re-examined the case of *Clark* v. *Cohen*, 613 F.Supp. 684 (M.D. Pa. 1985) and its predecessor, *Dixon* v. *Attorney General of Commonwealth of Pa.*, 325 F.Supp. 966 (M.D. Pa. 1971), and now reach the contrary conclusion that it would be a violation of due process for Kentucky to involuntarily commit a mentally retarded person who is eighteen years of age or over without first awarding his a judicial hearing. Our opinion in this regard is strengthened by the very thorough analysis which District Judge Huyett undertook in *Clark* v. *Cohen, supra,* to show that there are indeed significant differences between the due process rights of adult mentally retarded persons and the rights of juveniles in a similar position. *Id.*, 613 F.Supp. at 697 *et seq.* As Judge Huyett noted,

> *Parham* dealt only with the commitment of minors by their parents or legal guardians. The Court's decision rested very heavily on the assumption that both parents and guardians act in the best interests of the child and that both have traditional authority over the raising of minors in their care. This aspect of *Parham* makes it inapposite to a situation involving someone who is not a minor. Once someone becomes an adult, one's parents lose that degree of authority found so crucial in *Parham*. Moreover, as even the *Parham* court found, there is a possibility (born [e] out by this case) that a 'ward' of the state who is committed may become 'lost in the shuffle.' *Id.* at 699, *citing Parham*, 442 U.S. at 619.

While an involuntary commitment to an MRI may be the most humane solution for a profoundly or severely re-

tarded mentally retarded person who is unable to care for him or herself, it is still apparent that such commitment results in an extreme curtailment of personal liberty. Any decision by the state which results in such a profound a deprivation of personal liberty must be accompanied by substantial due process safeguards, particularly where the person who is to be committed may be lacking in the ability to fully protect his or her procedural rights. We therefore hold that mentally retarded persons over eighteen years of age are entitled to a judicial hearing and determination of the propriety of commitment, either prior to being involuntarily committed to an MRI or other facility, or as soon as practicable thereafter.

This holding applies equally to persons who are sought to be committed for the first time after they are eighteen and those who have been in the MRI prior to reaching eighteen but who then reach the age of eighteen. Of course, the state has the right to commit minors under the procedures that are now available under the statute and under the decision in *Parham*.

We also disagree with the statute's definition of what constitutes an "involuntary commitment." K.R.S. 202B.040(5) treats the application by parents or guardians for placement of their retarded family member or ward in any mental retardation center as voluntary, and thereby strips the mentally retarded adult of his or her rights to a *judicial* hearing and determination prior to commitment. As noted by this Court in *Kentucky Ass'n for Retarded Citizens* v. *Conn*, 510 F.Supp. 1233 (1980), *aff'd* 674 F.2d 582 (6th Cir.), *cert. denied* 459 U.S. 1041 (1982), many retarded adults are placed in MRI's by state appointed guardians who have no family ties with the mentally retarded person, and, even in those cases where the mentally retarded person is sought to be placed in an MRI by a relative or person who is also his legal guardian, the label of "voluntary commitment" cannot stand up in the face of the fact that the mentally retarded person is being committed without his or her consent. *Conn, supra*, 510 F.Supp. at 1248-49.

With regard to the equal protection argument, it is true that courts have stated that there are significant differences between the mentally ill and the mentally retarded. *See Kremens* v. *Bartley*, 431 U.S. 119, 135-36 (1977). However, the fact that there are significant differences between the mentally ill and the mentally retarded does not erase the principal that mentally ill persons and mentally retarded persons are in similar positions: each has a fundamental constitutional right not to be placed in an institution until a judicial hearing has taken place, and appropriate findings have been made that they pose a danger, or threat of danger, to self or others, and have met the other requirements set out in the statutes. *See* K.R.S. 202B.040 (mentally retarded); K.R.S. 202A.026 (mentally ill).

The statute, K.R.S. 202B, specifically requires that where a person who is alleged to be mentally retarded is involuntarily committed, the following determination shall be made: that he is mentally retarded, presents a danger or threat of danger to himself or others; that the least restrictive alternative mode of treatment is in a hospital or mental retardation residence treatment center; and that treatment that can reasonably benefit the individual is available in the hospital or mental retardation treatment center. K.R.S. 202B.040 (1986), The statute, however, does not explicitly prescribe who makes the ultimate determination as to whether these criteria have been met. It does provide that patients shall be admitted only on the approval of a physician. K.R.S. 202B.045 (1)(a). It also requires evaluation by the interdisciplinary team. K.R.S. 202B.010(1) and 202B.045. The statute, as amended, apparently even retains the requirement that the Secretary consent to the mentally retarded individual's commitment.

K.R.S. 202B.030. However, the statute no longer grants mentally retarded persons the right, granted to mentally ill persons under K.R.S. 202A.051, of having a judicial determination made as to the propriety of their involuntary commitment. *See* K.R.S. 202B.050 (1986). K.R.S. 202B therefore violates the equal protection clause because there is no rational basis for distinguishing between the mentally retarded and the mentally ill with regard to their initial involuntary confinement. Both categories of persons who are eighteen years of age or over must receive a judicial hearing.

We next come to the question of what significance the difference between mentally retarded and mentally ill persons entails insofar as it affects their right to periodic review of their commitment. The present law grants the mentally ill person the right of judicial review at least every 360 days after he or she has reached adulthood because he or she cannot be committed for a longer period. K.R.S. 202A.051 (1986). However, the present law does not grant the mentally retarded person judicial review of his or her indefinite commitment. In this connection, it is recognized that mentally ill persons may recover from their mental illnesses within relatively short periods after their judicial commitment, whereas severely and profoundly mentally retarded persons very rarely experience such dramatic improvements in their condition. This fundamental difference seems to indicate that the state could prescribe different modes of due process for the review of the commitment of severely and profoundly mentally retarded adults versus the review of the commitment of mentally ill adults. However, it is not our duty to spell out at this juncture what such due process procedures might be, and we have not yet been cited to any statute or decision which the parties contend controls the review rights of the mentally retarded adults.

Our only function at this time is to hold that there must be some judicial review, at some appropriate time, of the commitment of persons who are eighteen years or older and who are mentally retarded. Suffice it to say that the statute, as it now stands, is unconstitutional with respect to the right to a judicial hearing of mentally retarded adults prior to their involuntary commitment. *Clark* v. *Cohen*, 613 F.Supp. 684 (M.D. Pa. 1985).

We have this day entered a preliminary injunction and partial summary judgment in accordance with our opinion.

Dated 11-20-86

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

Civil Action No. C 82-0738 L(A)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

SAMUEL DOE, et al., - - - - - - - - - *Plaintiffs,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human Resources, - - - - - - - - - - *Defendant.*

PRELIMINARY INJUNCTION AND PARTIAL SUMMARY JUDGMENT—Entered Nov. 20, 1986

Plaintiffs having moved for a preliminary injunction and summary judgment, and defendant having moved the Court to reconsider its opinion and partial summary judgment of January 9, 1986, and the parties having fully briefed the issues, and the Court being of the opinion that a hearing is unnecessary on the motion for a preliminary injunction,

IT IS ORDERED AND ADJUDGED as follows:

1. Defendants are enjoined from committing to a mentally retarded treatment center, or any other facility for treatment of the mentally retarded, any allegedly mentally retarded person who is over eighteen years of age without first granting him or her a judicial hearing to determine whether or not he or she should be committed under the standards set out in K.R.S. 202B.040 (1-4). Defendants are likewise enjoined from continuing to confine any allegedly mentally retarded person in any such institution after he or she reached his or her eighteenth birthday, unless there

is a judicial hearing and a judicial determination made that the standards set out in K.R.S. 202B.040 (1-4) have been met. Such judicial hearing shall take place not later than three months after the person already committed has reached the age of eighteen years. The confined mentally retarded person referred to in the preceding two sentences may continue to be confined between the time such person attains the age of eighteen years and the time he or she receives the required judicial hearing. Plaintiffs shall give security in the amount of $100.00. Rule 65 (c), Fed. R. Civ. Pro.

2. Plaintiffs are further granted partial summary judgment on the issue of the unconstitutionality of K.R.S. Chapter 202B, as amended, such statute being in violation of the due process and equal protection rights of the Plaintiff as set forth in the accompanying memorandum opinion.

3. The parties shall have sixty (60) days from the date of this order in which to meet and confer for the purpose of submitting to the Court an agreed compliance plan for the provision of judicial proceedings in accordance with the opinion entered this day.

Dated 11-20-86

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

No. 86-6274

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SAMUEL DOE, by his mother and next friend, MARY DOE, - - - *Plaintiff-Appellee,*

v.

ELBERT AUSTIN, Secretary, Cabinet for Human Resources, - - - *Defendant-Appellant.*

On Appeal from the United States District Court for the Western District of Kentucky.

Decided and Filed June 15, 1988

Before: KEITH, MILBURN, and NORRIS, Circuit Judges.

KEITH, Circuit Judge. Defendant Elbert Austin, Secretary, Cabinet for Human Resources for the Commonwealth of Kentucky, appeals the order of the district court granting a preliminary injunction and partial summary judgment in favor of plaintiffs, a certified class of mentally retarded persons already involuntarily committed or subject to involuntary commitment to a state-owned mental retardation residential treatment center (RTC) who had challenged the constitutionality of Kentucky's civil commitment scheme as applied to mentally retarded adults.[1]

[1]Amici John Larry Voyles, Danny Dyer, Brian Shehan, the Parents and Relatives of Oakwood Facility, ICF/MR, Inc. (P.R.O.O.F) and concerned Families of Hazelwood Hospital, ICF/MR, Inc., parents and guardians of profoundly retarded individuals residing at Hazelwood Hospital, ICF/MR, filed a brief urging reversal.

For the following reasons, we AFFIRM in part and REVERSE in part.

Prior to 1986, and at the time that this matter was initiated, Kentucky provided a comprehensive statutory scheme to govern the involuntary civil commitment of the mentally ill, Ken. Rev. Stat. Ann. Chapter 202A (Baldwin 1982), which also governed the commitment of mentally retarded persons. Ken. Rev. Stat. Ann. § 202B.050.

Ken. Rev. Stat. Ann. Chapter 202A *et seq.* provided, in relevant part:

> (1) No involuntary commitment would take place unless the person to be committed (a) presented a danger or threat of danger to self or others; (b) could reasonably benefit from treatment; and (c) unless hospitalization represented the least restrictive mode of treatment, Ken. Rev. Stat. Ann. § 202A.026;
>
> (2) Although a staff physician could order an emergency admission, that physician must certify within twenty-four hours that an involuntary admission should occur, and any such emergency admission was limited to seventy-two hours, Ken. Rev. Stat. Ann. § 202A.031;
>
> (3) A preliminary hearing would be held in the district court within six days of the initial detention (or examination, if no emergency admission was sought), and a final hearing would take place within twenty-one days, Ken. Rev. Stat. Ann. § 202A.071;
>
> (4) The preliminary hearing although not required to be formal, would provide an opportunity for the person to be committed to testify, to present witnesses, and to cross-examine witnesses who had testified against her. Ken. Rev. Stat. Ann. § 202A.

076(1). The final hearing would provide the same safeguards; in addition, the rules of criminal procedure would apply, including the duty of the Commonwealth to prove beyond a reasonable doubt that confinement was warranted. Moreover, there was a right to a jury trial unless that right was waived. Ken. Rev. Stat. Ann. § 202A.076(2);

(5) The person to be committed had a right to counsel, Ken. Rev. Stat. Ann. § 202A.121, and a right to be present throughout the proceedings (unless this right was waived, or unless her conduct was unreasonably disruptive), Ken. Rev. Stat. Ann. § 202A.131;

(6) Discharge by an authorized staff physician during the prescribed period of involuntary commitment when the criteria for involuntary commitments were no longer met, Ken. Rev. Stat. Ann. § 202A.171;

(7) The opportunity for convalescent leave during the prescribed period of involuntary commitment, Ken. Rev. Stat. Ann. § 202A.181;

(8) A limitation of the prescribed period of confinement to sixty or three hundred sixty days without further judicial proceedings, Ken. Rev. Stat. Ann. § 202A.051.

Ken Rev. Stat. Ann. § 202B.050, before 1986, provided that all rights guaranteed by Ken. Rev. Stat. Ann. Chapters 202A and 210[2] would apply to mentally retarded persons. Section 202B.040 added the additional required determination to § 202A.026 that treatment that could reasonably

---

[2]Ken. Rev. Stat. Ann. Chapter 210 *et seq.* codifies the institutional structure of Kentucky's mental health care system; it is not at issue in this appeal.

benefit the individual be available in the hospital or mental retardation residential treatment center. Ken. Rev. Stat. Ann. § 202B.040(4). Furthermore, no mentally retarded person could be involuntarily hospitalized without the consent of the Secretary of the Cabinet for Human Resources, unless a determination of a concurrent mental illness requiring commitment was made pursuant to Chapter 202A. Ken. Rev. Stat. Ann. § 202B.030.

Despite the existence of this comprehensive statutory scheme, the Cabinet for Human Resources formed the Record Review Committee (RRC) for the purpose of controlling admissions to RTCs of mentally retarded persons. The RRC consisted of, at a minimum, a physician, a psychologist, a social worker, and a registered nurse. Procedurally, a parent or guardian was required to contact the local Comprehensive Care Center (operated by the Regional Mental Health-Mental Retardation Board), which would refer the mentally retarded person to the RRC. The written admissions policy of the Cabinet set out standards for admission:

> The suitability for admission to a mental retardation facility is determined by: a) the availability of appropriate alternative residential and training programs in the community, b) the availability of appropriate living and training space within the recommended facility, c) the severity of the applicant's handicap, and d) the status of the family's situation.

("Admissions Policies and Procedures for Mental Retardation Residential Facilities," August 21, 1981).

The RRC procedure accounted for virtually all admissions of mentally retarded persons to RTCs; indeed, during 1982, 1983, 1984 and 1985, only one mentally retarded person was admitted pursuant to the statutory procedures for involuntary commitment. However, the Cabinet's view has

consistently been that admissions under the RRC procedure, initiated by the parent or guardian, are voluntary in nature. Moreover, if the committed person was able to sign the Resident's Bill of Rights form which was presented at admission, by signature or by marking an "X," her admission was considered to be voluntary.

Once a person was admitted, his or her continued commitment was ostensibly evaluated according to the Mental Retardation Facility Discharge Protocol, based on Ken. Rev. Stat. Ann. § 210.270. That section provides a mechanism for community placements once the RTC staff determines that such placement is appropriate, including provisions for challenges to reclassification.[3]

The named plaintiff, Samuel Doe, was placed in 1971, at age eighteen, in the custody of what is now the Kentucky Cabinet for Human Resources. Under the authority of the Secretary of the Cabinet, he was institutionalized in the Outwood State Hospital, Dawson Springs, Kentucky. In 1977, while still at Outwood, he was adjudicated as incompetent at the initiation of the Commonwealth. Soon thereafter, his mother was appointed as his legal guardian. Doe has received no independent review of his confinement, judicial or otherwise, throughout the seventeen years of his institutionalization.

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983 challenging the failure of Kentucky to provide the safeguards required by Ken. Rev. Stat. Ann. Chapters 202A and 202B. In its first memorandum opinion, the district court found that defendants had adopted a policy af allowing parents to exert an absolute veto over the decision to

[3]Additionally, the Cabinet had adopted a policy which allowed parents an absolute veto over the decision to place their mentally ill children in community placements. This policy was held to be unconstitutional in the district court's first opinion, and it not at issue in this appeal.

release a patient to a community placement, and that such a practice was contrary to the holding of the Supreme Court in *Parham v. J.R.*, 442 U.S. 584 (1979). Memorandum Opinion of March, 28, 1984 (Memorandum I) at 13-17. The district court denied summary judgment in all other respects.

In its second memorandum opinion, the district court noted that because the great majority of profoundly and severely mentally retarded persons are incapable of making the decision as to whether admission into a RTC is in their best interest, all such admissions were to be considered involuntary. Memorandum Opinion of January 9, 1986 at 3, 9 (Memorandum II). It then concluded that, because Kentucky had declared that the mentally ill and the mentally retarded would be treated in the same manner, it constituted a denial of equal protection to apply the involuntary commitment statute to the mentally ill while refusing to make its provisions available to the mentally retarded. Memorandum II at 5-8.

In response to the district court's order, the Kentucky General Assembly amended Chapter 202B in an attempt to avoid the result reached by the district court. Ken. Rev. Stat. Ann. § 202B.050 was amended to read:

> All rights guaranteed by K.R.S. Chapters 202A (other than those rights enumerated in K.R.S. 202A.026 and 202A.051) and K.R.S. Chapter 210 to mentally ill persons shall apply to mentally retarded persons.

Ken. Rev. Stat. Ann. § 202B.050 (Baldwin 1986). Moreover, Ken. Rev. Stat. Ann. § 202B.040, listing the requirements for admission, was amended to include a fifth subsection:

> When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:

(1) He is a mentally retarded person:

(2) He presents a danger or a threat of danger to self or others;

(3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center;

(4) Treatment that can reasonably benefit the individual in the hospital or mental retardation residential treatment center; and

(5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family members' application has been evaluated by an interdisciplinary team as defined in K.R.S. 202B.010 and the subsequent admission fully complies with the provisions of K.R.S. Chapter 202B.

Ken. Rev. Stat. Ann. § 202B.040 (1986). The effect of this amendment was to define most admissions as technically "voluntary," without reference to the actual or independent wishes of the person to be committed.

Finally, a new section, Ken. Rev. Stat. Ann. § 202B.045 (1986), codified new requirements for admission and discharge:

(1) Admission:

(a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment:

(b) The interdisciplinary team shall:

1. Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factors; and

2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

(d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and

(e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall: (a) Offer counseling to parents or guardians who re-

> quest the release of a resident concerning the advantages and disadvantages of the release; (b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and (c) Prepare and place in the resident's record a summary of findings, progress, and plans.

The "interdisciplinary team" was defined as:

> the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker, and other professionals, at least one (1) of whom is a qualified mental health professional, and many include the resident, the resident's family, or the guardian.

Ken. Rev. Stat. Ann. § 202B.010(1) (1986). As the district court noted, "[t]he 1986 amendments (HB 477) effectively eliminated the rights of mentally retarded persons to a judicial hearing prior to involuntary commitment." Memorandum Opinion of November 20, 1986 (Memorandum III).

Plaintiffs moved for a summary judgment declaring HB 477 unconstitutional, while defendant moved for reconsideration of the district court's opinion and partial summary judgment of January 9, 1986. On November 20, 1986, the district court (a) reconsidered its previous holding that Kentucky's commitment procedures conformed with due process, and held that due process required a judicial hearing prior to commitment; (b) found that Kentucky could not define applications by parents or guardians for placement as "voluntary," Ken. Rev. Stat. Ann. § 202B.040(5) (1986); and (c) reaffirmed that equal protection required a judicial hearing. Defendant appeals.

II.

Involuntary civil commitment to a mental institution represents "a massive curtailment of liberty," requiring due process protection. *Vitek* v. *Jones*, 445 U.S. 480, 491-92 (1980); *Humphrey* v. *Cady*, 405 U. S. 504, 509 (1972). Indeed, the liberty deprivation resulting from involuntary commitment is more than a loss of mere physical freedom; the stigma which attaches upon entry to a mental health facility can have a profound impact upon individual liberty. *Addington* v. *Texas*, 441 U.S. 418, 425-26 (1979).

The Commonwealth does not contend that it may confine persons thought to be mentally retarded without providing any degree of due process. Instead, the Commonwealth argues that: (A) the named plaintiff does not have standing to pursue the class action because his confinement is, in fact, voluntary; and (B) the due process requirement is satisfied by an administrative procedure such as the one now provided by the Commonwealth, rather than requiring a judicial officer.

A.

As stated above, appellant's argument that Samuel Doe lacks standing to challenge the legality of his confinement depends on the voluntariness of both his initial and continued commitment. If, as appellant contends, Doe entered the RTC voluntarily, and remains voluntarily, he would not present a controversy for adjudication.

However, we note that appellant has a view of "voluntary" behavior which is, to say the least, expansive. By legislative fiat, the Commonwealth has deemed admissions initiated by a parent or guardian to be voluntary, with no regard for the actual wishes of the committed person. Ken.

Rev. Stat. Ann. § 202B.040(5) (1986). In fact, as stated by the district court:

> As noted by this Court in *Kentucky Ass'n for Retarded Citizens* v. *Conn*, 510 F. Supp. 1233 (1980), *aff'd* 674 F. 2d 582 (6th Cir.), *cert. denied*, 459 U.S. 1041 (1982), many retarded adults are placed in [RTCs] by state appointed guardians who have no family ties with the mentally retarded person, and, even in those cases where the mentally retarded person is sought to be placed in an [RTC] by a relative or person who is also his legal guardian, the label of "voluntary commitment" cannot stand up in the face of the fact that the mentally retarded person is being committed without his or her consent. *Conn, supra*, 510 F. Supp. at 1248-49.

Memorandum Opinion at 6.

We recognize that the Supreme Court has, at least implicitly, viewed the commitment of a minor to a mental facility by a parent or guardian, subject to review by a neutral factfinder, as a voluntary admission. *Parham* v. *J.R.*, 442 U.S. 524 (1979); *Pennsylvania* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979). However, as we discuss more fully in Section IIB, *infra*, minor children simply do not stand in the same position as adults with their parents. The traditional interrelationship of interests shared by parents and their minor children is not as presumptive as the minor passes from childhood to adulthood.

Likewise, the notion that the continuing confinement of the class members is voluntary notwithstanding the possible involuntariness of their initial confinement is, at best, an illusion. Indeed, the practice of relying upon some affirmative act on the part of profoundly and severely retarded persons to signal their will to escape confinement,

coupled with the presence of a parent or guardian who may have played a pivotal role in institutionalizing the admittee in the first instance, creates a quite palpable danger that the adult child will be "lost in the shuffle." Cf. *Parham*, 442 U.S. at 619. We decline to adopt a measure of voluntariness for the commitment of adults that favors form over substance.[4] Therefore, we agree with the district court that the commitment of mentally retarded adults by the Commonwealth upon application by a parent or guardian is to be considered involuntary.[5]

B.

The district court, relying upon the analysis of *Clark* v. *Cohen*, 613 F. Supp. 684 (M.D. Pa. 1985), *aff'd*, 794 F. 2d 79, *cert. denied*, 107 S. Ct. 459 (1986) (and its predecessor, *Dixon* v. *Attorney General of Commonwealth of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa. 1971)), held that it would be a violation of due process for the Commonwealth to involuntarily commit a mentally retarded adult without a

---

[4]For the same reasons, we cannot conclude, as amici argue, that the due process protections which are a part of the formal guardianship hearing, KRS 387.500 *et seq.*, vitiate the need for a hearing at the time of commitment. Moreover, the drastic curtailment of liberty which physical commitment represents makes a guardianship proceeding, which may have occurred at some time long before the actual confinement, a poor substitute for a contemporaneous hearing.

[5]Of course, because these admissions are involuntary, a determination must be made pursuant to § 202B.040 that the admittee presents a danger or a threat of danger to self or others, that confinement in a hospital or RTC represents the least restrictive alternative mode of treatment, and that reasonably beneficial treatment is in fact available at a hospital or RTC. The statute, while not explicit, seems to contemplate that the interdisciplinary committee would make such a determination.

prior *judicial* hearing. Memorandum Opinion at 4. On appeal, the Commonwealth argues that the due process claim asserted by appellees is controlled by *Parham, supra.*

In *Parham,* the Supreme Court held that the admission of minors to state mental health facilities by their parents was constitutional so long as an "inquiry [was] made by a 'neutral factfinder' to determine whether the statutory requirements for admission [were] satisfied." 442 U.S. at 606. The court found that a formal or informal hearing was not required, and explicitly endorsed the use of informal, traditional medical investigative techniques. 442 U.S. at 607. However, we do not view *Parham* as controlling. The Court in *Parham* was concerned with the commitment of minor children, and its conclusions flow more or less naturally from the unique and traditional relationship shared between parent and child. 442 U.S. at 602-03; *Clark* v. *Cohen,* 613 F. Supp. at 699. "Once someone becomes an adult, one's parents lose that degree of authority found so crucial *in Parham.*" *Clark,* 613 F. Supp. at 699. Moreover, the interest of the parents in avoiding "significant intrusion into the parent-child relationship." at noted in *Parham,* 442 U.S. at 610, is simply not as great in the case of an adult.

We recognize that the decision to commit a person because of mental retardation is, to a large degree, medical in nature. As noted on *Parham,* "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments." 442 U.S. at 607. However, "[t]he medical nature of the inquiry . . . does not justify dispensing with due process requirements. It is precisely the subtleties and nuances of psychiatric diagnoses that justify the requirement of adversary hearings." *Vitek* v. *Jones,* 445 U.S. at 495. Although dispensing with an adversary proceeding may be justified in the case

of a child, we cannot conclude that adults stand in the same position.

However, we also cannot agree with the conclusion of the district court that, because *Parham* is not controlling, due process requires that adults who are involuntarily committed are entitled to a *judicial* hearing. Although, as a matter of policy, precommitment review by a judicial officer would ensure the most vigorous protection of the mentally retarded, and thus, might be preferable, it has been noted in a variety of situations that due process does not require that the neutral trier of fact be legally trained or a judicial or administrative officer. *Parham,* 442 U.S. at 607; *Morrissey* v. *Brewer,* 408 U.S. 471, 489 (1972) (parole revocation hearing); *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970) (hearing prior to termination of AFDC benefits).

In identifying those procedures which are required to ensure due process, we are guided by the Supreme Court's opinion in *Vitek* v. *Jones,* 445 U.S. 480 (1980). In *Vitek,* a convicted felon was transferred from a state prison to a mental facility under a state statute which allowed the Director of Correctional Services to effectuate such a transfer upon a finding by a designated physician or psychiatrist that a prisoner "suffers from a mental disease or defect" and "cannot be given proper treatment" in the prison itself. 445 U.S. at 483-4. In affirming the district court's holding that the statute, as applied to the prisoner, deprived him of due process, the Supreme Court approved the district court's requirement of the following minimum procedures:

1. Written notice to the prisoner that a transfer to a mental hospital is being considered;
2. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be

heard in person and to present documentary evidence is given;

3. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the State;
4. An independent decisionmaker;[6]
5. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
6. Qualified and independent assistance must be provided to the inmate.

445 U.S. at 494-5.

Without question, due process requires that mentally retarded adults in Kentucky receive, at a minimum, the procedural safeguards listed above. If these basic safeguards are required before an inmate is transferred from a prison to a mental hospital, surely a person thought to be mentally retarded must be afforded at least the same level of protection before being removed from an ostensibly unfettered existence in society to the confines of an institution. *See Morris, The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment*, 60 Tul. L. Rev. 927, 942 (1986).

Under the current statutory procedure for the involuntary commitment of adults in Kentucky, however, there is no formal mechanism for providing notice, and no method of assuring that the adequacy of notice is related to the time which the potential admittee would require to prepare for the hearing. There is no procedure whereby the admittee may present witnesses or documentary evidence, nor is

[6]Moreover, the independent decisionmaker must have the authority to implement its decision. *See Parham*, 442 U.S. at 607; *Clark* v. *Cohen*, 794 F. 2d at 86.

there a clear opportunity for cross-examination. No independent assistance is allowed by the statute.[7] Moreover the parent or guardian of the person to be committed is allowed to be a member of the interdisciplinary team, which poses a serious threat to impartiality. Ken. Rev. Stat. Ann. § 202B.010(1) (1986). Therefore, although we do not conclude that a judicial hearing is required, we agree with the district court's conclusion that the current procedure does not conform with due process.

III.

The Equal Protection Clause of the Fourteenth Amendment requires "that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). If a state enacts legislation which treats different classes of people differently, the classification drawn by the statute must be rationally related to a legitimate state purpose, 473 U.S. at 440. The district court held that the denial of a judicial hearing deprived appellees of equal protection under the laws. We agree.

The Commonwealth has not demonstrated that it has any rational basis for distinguishing between the mentally ill and the mentally retarded with regard to a judicial determination of their eligibility for civil commitment. We recognize that, as a matter of fact, there are differences between the mentally ill and the mentally retarded. *See Kremens v. Bartley*, 431 U.S. 119, 135-36 (1977). However,

[7]The statute anticipates that the parent or guardian would participate in the process; however, such assistance could hardly be deemed to be independent. *See Lessard* v. *Schmidt*, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972), *vacated and remanded for a more specific order*, 414 U.S. 743, *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976).

the mere identification of differences is not enough; equal protection "require[s] that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

The Commonwealth identifies two interests which it argues are served by the distinction it draws between the mentally ill and the mentally retarded: (1) an interest in not imposing unnecessary procedural obstacles which might prohibit legal guardians from seeking available services for their mentally retarded wards; and (2) its interest in prioritizing diagnostic and service resources to the mentally retarded as soon as possible instead of expending resources in time-consuming procedures prior to admission. However, surely these interests apply to the mentally *ill* as well; the Commonwealth cannot show that the *distinction* which is drawn is rationally related to its stated purposes. *Baxstrom*, 383 U.S. at 111-12; *see Jackson v. Indiana*, 406 U.S. 715, 724 (1972). Therefore, we agreed with the district court that equal protection requires the Commonwealth to provide a judicial hearing to appellees, either upon admission, or, if now committed, when they reach adulthood.

IV.

Appellants further argue that the district court erred in holding that periodic judicial review over the course of commitment was required by equal protection. Appellees, in response, interpret the opinion below as holding that the requirements of equal protection *and* due process mandated periodic judicial review. However, one could conclude from a fair reading of the Memorandum Opinion that the district court did not in fact rule on this issue. After a discussion of the difference between the prospects of recovery for the mentally ill and the mentally retarded, and after noting that "this fundamental difference seems to indicate that the state could prescribe different modes of due process for the re-

view of the commitment of severely and profoundly mentally retarded adults versus the review of the commitment of mentally ill adults," Memorandum III at 8-9, it goes on to conclude:

> However, it is not our duty to spell out at this juncture what such due process procedures might be, and we have not yet been cited to any statute or decision which the parties contend controls the review rights of the mentally retarded adults.
>
> Our only function at this time is to hold that there must be some judicial review, at some appropriate time, of the commitment of persons who are eighteen years or older and who are mentally retarded. Suffice to say that the statute, as it now stands, is unconstitutional with respect to the right to a judicial hearing of mentally retarded adults prior to their involuntary commitment. *Clark v. Cohen*, 613 F. Supp. 684 (M.D. Pa. 1985).

Memorandum III at 9.

A fair reading of this section of the opinion would seem to indicate that the phrase "judicial review" in the above quote refers to the district court's conclusion that due process and equal protection, require that, at *some* point, a judicial determination must be made. It is not at all clear that the district court held that due process or equal protection required *periodic* judicial review; indeed, given the fact that the district court recognized that legitimate and relevant factors distinguished the mentally ill and the mentally retarded concerning the efficacy of treatment once they were committed, it at least seems unlikely that appellant's interpretation is correct. However, because both parties have concluded, through their respective interpretations, that there was a holding on this issue, and because both interpretations are at least conceivable from a reading

of the Memorandum Opinion, we shall discuss whether due process or equal protection requires periodic judicial review.[8]

A.

Our discussion of judicial hearings at admission as a requirement of due process, Section IIB, *supra*, is applicable to our analysis here. If one has no due process right to a judicial hearing before one is initially committed, logic dictates that no such right exists during the period of confinement. Of course, because involuntary confinement cannot continue after the basis for that confinement ceases to exist, due process requires that *some* periodic review take place during confinement. *See O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975). However, as in the case of the initial admission, we cannot say that due process requires a periodic *judicial* review.

B.

As the district court noted, for purposes of equal protection analysis of the requirement for periodic review, "it is recognized that mentally ill persons may recover from their mental illnesses within relatively short periods after their . . . commitment, whereas severely and profoundly mentally retarded persons very rarely experience such dramatic improvements in their condition." Memorandum at 8-9. Thus, there may be constitutionally valid reasons for providing different methods of periodic review for the mentally retarded and the mentally ill. However, we see no legitimate interest of the Commonwealth which would justify denying the mentally retarded periodic judicial

[8]Also, there is little point in reserving the issue for another day, as it is a virtual certainty that this court shall be required to address it at some juncture.

review while providing the same to the mentally ill. Therefore, the Commonwealth must make a judicial review procedure available to the mentally retarded.[9]

V.

Therefore, for the foregoing reasons, we REVERSE the judgment of the district court inasmuch as it mandates a judicial hearing prior to commitment and periodic judicial review as requirements of due process, and REMAND this issue to the district court to allow it an opportunity to revise the grant of partial summary judgment in a manner consistent with this opinion. In all other respects, the judgment below is AFFIRMED.

[9]The task of resolving how that procedure may differ from that provided to the mentally ill is one best left to the district court, as it will have the benefit of plans submitted by the parties, and can make findings of fact concerning the relative prognoses of the mentally retarded and the mentally ill.

DEPOSITION OF SANDRA MLINARCIK

Direct Examination by Ms. Miller:

36

Mlinarcik--Direct

Q Okay. Do you recall generally the results of your survey?

A I can only speak to the day that I was there. The day that I worked at Hazelwood my team, which was composed of four individuals, one of whom is a staff person at Central State, one of whom was a unit leader at Hazelwood, myself and Ann Oliver, who's the area coordinator for DMR, that was the team I served on. We did 58 assessments.

Q Do you know —

A (Continuing) And of the 58 I think my team had a total of nine individuals who were not recommended for AIS/MR or group home.

Q Nine that were not recommended?

A Right. Nine that were recommended as ICF/MR being the most appropriate least restrictive placement.

Q So of the 58, 49 would be appropriate for placement?

A That's to the best of my recollection. I don't have anything in writing to check on that. That was just at the end of the day we took a count. That was, I believe, the number.

• • • • • • •

46

Cross-examination by Mr. Moore:

• • • • • • •

Q Okay. So that the AIS/MR program that we operate, that Kentucky operates, is one that —

A (Interrupting) We designed in compliance with broad general—broad federal guidelines. The copies of

waivers that I have boxes here from other states, there's no comparison from state to state.

Q As I understand your testimony, the services that you provide through your AIS/MR program here are designed to provide the same level of care as an individual would receive in a facility such as Hazelwood ICF/MR?

A Right.

Q Okay.

A People need to need the same level of care. So, for instance, when we take an application on an individual to serve them in our AIS/MR program, they have to need the same level of care as they would to get into an ICF/MR. So if somebody came into our program who was not

47

mentally retarded and was requesting to be served in the waiver and that person's primary diagnosis was a mental health diagnosis, we wouldn't serve them, because the facilities wouldn't accept them, either. The person needs to qualify for the same level of care that they would receive in an ICF/MR to be eligible for this program.

Q Can you describe for us exactly what that need is for that level of care? In addition to being mentally retarded, I assume that there have to be some health problems or some other basic care needs?

A Right. A person would probably be in need of 24-hour supervision. A person would probably have to have support, at least a structure for guidance and oversight of all of their daily living skills and their needs. They would have to have their time structured throughout the day. They would need to be shown to benefit from active treatment. And that is determined by a tool—it's very similar to the one used, well, like for a facility application. In fact, many of the people who participate in our program have

had facility applications done on them, and Division of Institutional Care has said 'yes, this person is appropriate for facility placement'. We're serving many of those people in our program as an alternative.

• • • • • • • •

68

• • • • • • • •

Q Let me ask you—I understand that is. Let me ask you if it would be proper to make an analogy between the arrangements you've described that you developed for this other gentleman and that which you would anticipate developing for Tracy, much like that of having a constant companion or big brother for the retarded person to—a benevolent big brother or overseer to try and do what that person wanted?

A No. That isn't accurate. It's a clinical staff treatment program. It's not a big brother service. I think a clear explanation in terms of individualization and attention given to an individual's needs would be based on some of my recent experiences in the facilities. When I was at Hazelwood for these assessments, everybody in a given unit was wrapped in a sheet and laid on a mat on the floor from ten to eleven-thirty every day to rest. I find it hard to believe that all of the individuals in that room all really physically needed a rest at that time. In an adult habilitation program a person would rest during the day when they individually had a physical need to rest and we were able to detect that. So to me that is less restrictive than programming for numbers of

69

people in a given unit rather than for an individual.

Q Okay. You mentioned that there's a day treatment program that's provided to mentally retarded people in the AIS/MR program?

A Un-huh.

Q Is that not a structured program?

A It is a structured program with individual programs in it so that not everybody is in the same place at the same time. It is not—it runs from nine to three every day with a home base for the program, but everybody in the program has an individual schedule on a daily basis. The staffing ratio is very high. It's two-to-one staffing ratio which allows a lot of flexibility and individualization.

Q Two staff to one?

A No. Two clients per staff.

Q Okay. In the adult day habilitation program is there no situation where there are two or more clients together at a time?

A There may be periods of time where there might be three or four clients with—in a given area with a staff person.

• • • • • • • •

71

• • • • • • • •

Q Okay. Do you have an opinion as to whether or not Hazelwood serves a valid function in the provision of services to the mentally retarded?

72

A Hazelwood is currently serving the function of providing institutional care for individuals who live there for whom there are no other options available. I do not think it is serving—it is not the model choice for any individuals with mental retardation or developmental disability.

Q Okay. The institutional model would not be the model of choice?

A Un-huh.

Q The model of choice by whom?

A You asked for my opinion.

Q Okay. That's not your opinion as to the—

A (Interrupting) That's my opinion.

Q Okay. You'd prefer community placement for all mentally retarded individuals?

A If the community were able to provide the level of care to meet the needs of the individual.

Q Okay. Did I correctly understand from your testimony that given the proper level of funding, that Seven Counties or your program could provide for virtually anyone that's currently in the institution?

A Yes.

• • • • • • •

73

Redirect Examination by Ms. Miller:

Ms. Miller: I've got just a few real quick questions, and I'll get you out. Mr. Moore asked you several questions about whether or not you thought Hazelwood as an institution was more restrictive. When you talk about restrictive in determining whether a placement is least restrictive, does it go beyond the four walls and the number of beds, or would it be accurate to say it also includes the type of programs and care that the facility offered?

Ms. Mlinarcik: Could you say that again?

Q It's a long question. Okay. I'm trying to get this all in at once. Okay. Just talking about whether or not Hazelwood is a restrictive placement for an individual. In determining what's restrictive about it, what do you consider?

A I think I almost have to use another word there, Kelly, and that is congregate, that when the larger numbers

of people are congregated, service provision is determined not only by the needs of the individual but also for efficiency and feasibility. They can't serve 220 different dinners. They can't have people going to bed at 17 different times. I think out of necessity congregate settings have to provide services in a more restrictive manner, restrictive in terms of individualization, frequency and

74

intensity.

Q Okay.

A Now, to be—in the community I think we also have some restrictions. Right now our biggest one is financial. We didn't have $149 a day per person like the facilities do. We have forty.

Q Okay. Let me ask you this. You testified about a recent observation of seeing residents at Hazelwood being wrapped up in sheets and laid on the floor. Is that one of the concerns that you talk about in treating individuals in a congregate manner?

A I believe that having a rest time five days a week from ten to eleven-thirty for perhaps the ten individuals that were covered with sheets and laying on the mats was more in—more to serve the schedule and the staffing needs than it was for the individual needs of those persons.

Q Okay.

A I think taking an hour and a half nap in the middle of the morning is not age appropriate for adults.

Q And talking about AIS/MR placements, in your professional opinion are those less restrictive than an institutional setting?

A Yes.

[90 RS BR 1782/EN
HB 511]

AN ACT relating to civil commitment.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 202B.010 is amended to read as follows:

As used in this chapter, unless the context otherwise requires:

(1) "Authorized staff physician" means a person who is employed as a physician of an ICF/MR;

(2) "Interdisciplinary team" means the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker and other professionals, at least one (1) of whom is a qualified mental retardation [~~health~~] professional, and may include the resident, the resident's family, or the guardian;

(3) "Cabinet" means the Kentucky Cabinet for Human Resources;

(4) "Danger" or "threat of danger to self, family or others" means substantial physical harm or threat of substantial physical harm upon self, family or others, including actions which deprive self, family or others of the basic means of survival including provision for reasonable shelter, food or clothing.

(5) "Forensic psychiatric facility" means a mental institution or facility, or part thereof, designated by the secretary for the purpose and function of providing inpatient evaluation, care and treatment for mentally ill or mentally retarded persons who have been charged with or convicted of a felony;

(6) "Hospital" means;

(a) A state mental hospital or institution or other licensed public or private hospital, institution, health care facility, or part thereof, approved by the Kentucky Cabinet for Human Resources as equipped to provide full-time residential care and treatment for mentally ill or mentally retarded persons;

(b) A hospital, institution or health care facility of the government of the United States equipped to provide residential care and treatment for mentally ill or mentally retarded persons;

(7) "Judge" means any judge or justice of the Court of Justice or a trial commissioner of the District Court acting under authority of SCR 5.030;

(8) "Least restrictive alternative mode of treatment" means that treatment given in the least confining setting which will provide a mentally retarded person appropriate treatment or care consistent with accepted professional practice. For purposes of this section, least restrictive alternative mode of treatment may include an institutional placement;

(9) [~~(2)~~] "Mentally retarded person" means a person with significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period;

(10) "ICF/MR [~~(3) "Mental retardation residential treatment center~~]" means *an intermediate care* [~~a residential treatment~~] facility approved by the *cabinet* [~~department~~] for the evaluation, care and treatment of mentally retarded persons;

(11) "Petitioner" means a person who institutes a proceeding under this chapter;

(12) [~~(4)~~] "Qualified mental retardation professional" means:

(a) A *physician licensed under the laws of Kentucky to practice medicine of osteopathy, or a medical officer of the government of the United States while engaged in the performance of official duties;*

(b) A psychologist licensed at the doctoral level or a psychologist or psychological associate certified at the master's level under the provisions of KRS Chapter 319 who has been designated by the Kentucky Board of Examiners of Psychologists as competent to make examinations under this chapter;

(c) A licensed registered nurse with a master's degree in psychiatric nursing from an accredited institution and two (2) years of clinical experience of which one (1) year is with mentally retarded persons; or a licensed registered nurse, with a bachelor's degree in nursing from an accredited institution, who has three (3) years of inpatient or outpatient clinical experience of which one (1) year is in the field of mental retardation and is currently employed by an ICF/MR licensed by the cabinet, a hospital, a regional community mental health and mental retardation program or a private agency or company engaged in the provision of mental retardation services; and

(d) A certified social worker licensed for the independent practice of clinical social work under the provisions of KRS Chapter 335, or a certified social worker under the provisions of KRS Chapter 335 with two (2) years of inpatient of outpatient clinical experience in social work of which one (1) year shall be in the field of mental retardation and is currently employed by an ICF/MR licensed by the cabinet, a hospital, a regional community mental health and mental retardation program or a private agency or company engaged in the provision of mental retardation services ~~[psychologist licensed under the provisions of KRS Chapter 319 who has either one (1) year of specialized training for work with mentally retarded persons or one (1) year of clinical experience with mentally retarded persons;~~

~~(b) A licensed registered nurse with a master's degree in psychiatric nursing from an accredited institution with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons or he shall have one (1) year of specialized training for work with mentally retarded persons;~~

~~(c) A certified social worker licensed under the provisions of KRS Chapter 335 or accredited by the academy of certified social workers with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons or he shall have one (1) year of specialized training for work with mentally retarded persons;~~

~~(d) A psychologist or a psychological associated with a master's degree from an accredited institution who has been awarded a certificate of qualification by the Kentucky board of examiners of psychologists under the provisions of KRS Chapter 319 with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons or he shall have one (1) year of specialized training for work with mentally retarded persons; and~~

~~(e) Other professional persons with similar training and experience who are qualified according to regulations promulgated by the secretary to participate in seventy-two (72) hour involuntary hospitalization procedures under this chapter];~~

(13) "Residence" means legal residence as determined by applicable principles governing conflicts of law;

(14) [~~(5)~~] "Resident" means a person under care or treatment in *an ICF/MR* [~~a mental retardation residential treatment center~~] pursuant to the provisions of this chapter; [~~and~~]

(15) "Respondent" means a person alleged in a hear-

ing under this chapter to be a mentally retarded person; and

(16) "Secretary" shall mean the secretary of the Cabinet for Human Resources.

[~~(6) All terms defined in KRS Chapter 202A shall have the same meaning when used in this chapter.~~]

SECTION 2. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

All proceedings for the involuntary admission of mentally retarded persons shall be initiated in the District Court of the county where the person to be treated resides or in which the person may be at the time of the filing of a petition.

SECTION 3. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

In all proceedings under this chapter, it shall be the duty of the county attorney to assist the petitioner and represent the interest of the Commonwealth and to assist the court in its inquiry by the presentation of evidence.

SECTION 4. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Mentally retarded minors and adult persons may be voluntarily admitted for care and treatment in an ICF/MR under the applicable provisions of this section.

(2) Upon the recommendation or approval of the interdisciplinary team of an ICF/MR, a physician may admit for care and treatment a mentally retarded minor upon application of a parent or guardian. Upon recommendation or approval of the interdisciplinary team of an ICF/MR, the physician may also admit a mildly or moderately mentally retarded adult person who applies voluntarily therefor and who, in the opinion of the physician, possesses the mental capacity to give informed consent for admission.

(3) Upon recommendation or approval of the interdisciplinary team of an ICF/MR, the physician shall discharge any voluntarily admitted resident whose care and treatment in the ICF/MR is determined to be no longer necessary or advisable.

SECTION 5. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) An authorized staff physician may order the admission of any person who is present at, or is presented at, an ICF/MR, within twenty-four (24) hours, excluding weekends and holidays, of the admission under this section, the authorized staff physician ordering the admission of the person shall certify in the record of the individual that in the opinion of the physician, the individual should be involuntarily admitted.

(2) Any person who has been admitted to an ICF/MR under subsection (1) of this section shall be released from the ICF/MR within seventy-two (72) hours, excluding weekends and holidays, unless further detained under the applicable provisions of this chapter.

Section 6. KRS 202B.030 is amended to read as follows:

When mentally retarded individuals are involuntarily hospitalized under this chapter, the cabinet may place them in *an ICF/MR* [~~a mental retardation residential treatment center~~]. No mentally retarded person may be involuntarily placed in a hospital without the consent of the secretary, except when the determination of concurrent mental illness is made under the provisions of KRS Chapter 202A. No mentally retarded person [~~or juvenile~~] may be involuntarily admitted to a hospital or *ICF/MR* [~~mental retardation residential treatment center~~] when the cabinet determines that appropriate programs and space are not available.

Section 7. KRS 202B.040 is amended to read as follows:

When a person who is alleged to be mentally retarded is involuntarily *admitted* [~~committed~~], there shall be a determination that:

(1) *The person* [~~He~~] is a mentally retarded person;

(2) *The person* [~~He~~] presents a danger or a threat of danger to self, *family* or others;

(3) The least restrictive alternative mode of treatment *presently available* requires placement in *an ICF/MR* [~~a hospital or mental retardation residential treatment center~~]; *and*

(4) Treatment that can reasonably benefit the *person* [~~individual~~] is available in *an ICF/MR* [~~the hospital or mental retardation residential treatment center; and~~

~~(5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section, provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in KRS202B.010 and the subsequent admission fully complies with the provisions of KRS Chapter 202B~~].

Section 8. KRS 202B.045 is amended to read follows:

(1) Admission:

(a) *Residents* [~~Patients~~] shall be admitted only upon approval of *an interdisciplinary team* [~~a physician~~]. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment;

(b) The interdisciplinary team shall:

1. Conduct a comprehensive evaluation of the individual, not more than three (3) month before admission,

covering physical, emotional, social, and cognitive factors; and

2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

(d) Before admission, the resident and a responsible member of his family or *guardian* [~~committee~~] shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and

(e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for *the resident's* [~~his~~] own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall:

(a) Offer counseling to parents or guardians who request the release of a resident concerning the advantages and disadvantages of the release;

(b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other follow-up services; and

(c) Prepare and place in the resident's record a summary of findings, progress, and plans.

SECTION 9. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Proceedings for involuntary admission of a person to an ICF/MR shall be initiated by the filing of a verified petition in District Court.

(2) The petition and all subsequent court documents shall be entitled: "In the interest of (name of respondent)."

(3) The petition shall be filed by a qualified mental retardation professional, peace officer, county attorney, Commonwealth's attorney, spouse, relative, friend or guardian of the person concerning whom the petition is filed.

(4) The petition shall set forth:

(a) Petitioner's relationship to the respondent;

(b) Respondent's name, residence and current location, if known;

(c) The name and residence of respondent's parents, if living and if known, or respondent's legal guardian, if any and if known;

(d) The name and residence of respondent's husband or wife, if any, and if known;

(e) The name and residence of the person having custody of the respondent, if any, or if no such person is known, the name and residence of a near relative or that such person is unknown; and

(f) Petitioner's belief, including the factual basis therefor, that the respondent is mentally retarded and presents a danger or threat of danger to self, family or others if not admitted to an ICF/MR.

(5) Upon receipt of the petition, the court shall examine the petitioner under oath as to the contents of the petition. If the petitioner is a qualified mental retardation professional, the court may dispense with the examination.

(6) If, after reviewing the allegations contained in the petition and examining the petitioner under oath, it appears to the court that there is probable cause to believe the respondent should be involuntarily admitted, the court shall;

(a) Set a date for a preliminary hearing;

(b) Notify the respondent, the respondent's legal guardian, if any, and if known, and the respondent's spouse, parents, or nearest relative or friend concerning the allegations and contents of the petition and the date and purpose of the preliminary hearing; and the name, address and telephone number of the attorney appointed to represent the respondent; and

(c) Cause the respondent to be examined without unnecessary delay by two (2) qualified mental retardation professionals, at least one (1) of whom is a physician. The qualified mental retardation professionals shall certify their findings within twenty-four (24) hours, excluding weekends and holidays.

(7) (a) If the respondent is presently residing in an ICF/MR under the provisions of this chapter, the court may allow continued further residence therein for the respondent to accomplish the examination ordered by the court.

(b) If the respondent is not currently residing in an ICF/MR under the provisions of this chapter, the court may order the respondent, the respondent's guardian, or any person or entity exercising custodial control of the respondent to submit the respondent to an examination, without unnecessary delay, by two (2) qualified mental retardation professionals, at least one (1) of whom is a physician.

(8) If, upon completion of the preliminary hearing, the court finds there is probable cause to believe the respondent should be involuntarily admitted, the court shall order a final hearing to determine if the respondent should be involuntarily admitted.

(9) If the court finds there is no probable cause, the proceedings against the respondent shall be dismissed, and the respondent shall be released from the ICF/MR.

(10) If, upon completion of the final hearing, the court finds the respondent should be involuntarily admitted, the court shall order the respondent admitted in an ICF/MR for an indeterminate period. The order shall also specify the period within which the initial review pursuant to Section 24 of this Act is to be held.

SECTION 10. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

A respondent who has been ordered involuntarily admitted following the preliminary hearing shall have venue for all subsequent proceedings, including the final hearing, transferred to the court of the county where the respondent is admitted; however, the court of the county where the preliminary hearing was held may, upon its own motion, or shall, upon motion of one (1) of the parties, retain venue over proceedings subsequent to the preliminary hearing.

SECTION 11. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) The certificate referred to in this chapter shall be in the form prescribed by the cabinet. The certificate shall state that the respondent has been examined by each of the qualified mental retardation professionals making the certificate within twenty-four (24) hours, excluding weekends and holidays, prior to the date of the certificate. It shall state the facts and circumstances upon which the judgment of the examining physician is based and shall be sworn to before a notary or the clerk or judge of the court.

(2) The examiner shall be entitled to a fee for the examination and certification, to be paid by the county in which the petition is filed, upon a certified copy of an order of allowance made by the court holding the hearing.

SECTION 12. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

If any proceeding for involuntary admission under the applicable provisions of this chapter, if the criteria for involuntary admission are not certified by at least two (2) examining qualified mental retardation professionals, at least one (1) of whom is a physician, the court shall, without taking any further action, terminate the proceedings and order the release of the person. The qualified mental retardation professionals shall certify to the court, within twenty-four (24) hours of the examination, excluding weekends and holidays, their findings and opinions as to whether the person shall be involuntarily admitted.

SECTION 13. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

A qualified mental retardation professional retained by the respondent, or the respondent's parent or guardian, at the expense of the parent or guardian, shall be permitted to witness and participate in any examination of the respondent and may submit findings, if any, to the court.

SECTION 14. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) The preliminary hearing shall be held not later than fifteen (15) days, excluding weekends and holidays from the date of the filing of the petition.

(2) The final hearing shall be held within twenty (20) days of the date of the preliminary hearing or within thirty (30) days of the date of filing of the petition if the preliminary hearing is waived.

SECTION 15. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) The preliminary hearing need not be formal and shall include the receiving of the qualified mental retardation professionals' reports as evidence. The hearing may be

held by the court in chambers, at an ICF/MR, or other suitable place. The respondent shall be afforded an opportunity to testify, to present witnesses, and to cross-examine any witnesses. The respondent and the attorney for the respondent may waive respondent's right to a preliminary hearing.

(2) The final hearing may be conducted in an informal manner, consistent with orderly procedures, and in a physical setting not likely to have a harmful effect on the mental or physical health of the respondent. The hearing may be held by the court in chambers, at an ICF/MR, or other suitable place. The respondent shall be afforded an opportunity to testify, to present, and cross-examine any witnesses. The manner of proceeding and the rules of evidence shall be the same as those in any criminal proceeding, except that the standard of proof shall be by clear and convincing evidence. Proceedings shall be heard by a judge unless a party requests a jury trial. Neither the respondent nor the respondent's attorney may waive the respondent's right to a final hearing.

(3) Guardians and immediate family members of the respondent shall be allowed to attend all hearings, conferences or similar proceedings; may be represented by private council, if desired; may participate in the hearings or conferences as if a party to the proceedings; may cross-examine witnesses if desired; and shall have standing to appeal any adverse decision.

SECTION 16. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Following the preliminary hearing but prior to the completion of the final hearing, the court may order the respondent to reside in an ICF/MR approved by the secretary for that purpose for the committing judicial district in a community program approved by the secretary, in a hospital, or in jail for a period not to exceed forty-eight (48)

hours if no other alternative exists. The respondent may be released, upon application and agreement of the parties, for the purpose of community-based outpatient treatment.

(2) A physician of an ICF/MR or a hospital shall discharge a respondent residing therein and notify the court and attorneys of record, if the interdisciplinary team of the ICF/MR or an authorized staff physician of the hospital determines that the respondent no longer meets the criteria for involuntary admission.

(3) If a respondent is discharged by the ICF/MR or hospital pursuant to subsection (2) of this section, the proceedings against the respondent shall be dismissed.

SECTION 17. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) The court records of respondent made in all proceedings pursuant to KRS Chapter 202B shall be confidential and shall not be open to the general public for inspection except when the disclosure is provided in Section 18 of this Act.

(2) Following the discharge of a respondent from an ICF/MR or hospital or the issuance of a court order denying a petition for admission, a respondent may at any time move to have all court records pertaining to the proceedings expunged from the files of the court. The county attorney shall be given notice of any motion and shall have five (5) days in which to respond to same or request a hearing thereon.

(3) Any person seeking information contained in the court files or the court records of proceedings involving persons under this chapter may file a written motion in the appropriate court setting out why the information is needed. A district judge may issue an order to disclose the information sought if the judge finds the order is appropriate under the circumstances and if the judge finds it is in the best

interest of the person or of the public to have the information disclosed.

SECTION 18. AN NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

In proceedings under this chapter, there shall be no privilege as to any relevant communications between qualified mental retardation professionals and patients. Qualified mental retardation professionals may disclose communications relating to diagnosis and treatment of the patient's mental condition.

SECTION 19. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) The court which orders any person to an ICF/MR under the provisions of this chapter, shall at once notify the cabinet that the order has been made, advising of the sex and condition of the person.

(2) The ICF/MR may refuse to receive any person who has been ordered to be involuntarily admitted by a court order if appropriate programs and space are not available or the papers presented with the person at the ICF/MR do not comply with the provisions of this chapter or if it does not receive notification of the order or involuntary admission as required by this chapter.

(3) After the cabinet has been so notified, the court may order the sheriff of the county to transport the person within forty-eight (48) hours, excluding weekends and holidays, from the county in which the person is located to the ICF/MR designed by the cabinet. The actual traveling expenses of persons transporting the person to the institution shall be paid by the cabinet. Each female admitted to an ICF/MR shall be accompanied by a female attendant, unless accompanied by her mother, father, sister, brother, husband, daughter or son.

(4) In returning any person to the county from which

that person is sent, the cost of returning the person shall be paid in the same manner when necessary.

(5) If a person is involuntarily admitted by a court order, the person shall be transported to the ICF/MR designated by the cabinet and accompanied by the following documents:

(a) A copy of the petition for involuntary admission;

(b) The certificate of qualified mental retardation professionals; and

(c) The order of involuntary admission.

SECTION 20. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

Upon the filing of a petition for involuntary admission pursuant to Section 8 of this Act, the court shall appoint an attorney to represent the respondent with the appointment and representation to continue unless the respondent retains private counsel. The appointed attorney shall be forthwith notified by the clerk of the allegations in the petition and the date and purpose of the preliminary hearing. When it is necessary to appoint counsel, the District Court shall endeavor to appoint private counsel, if available, to represent respondents, from a list of attorneys who have volunteered to represent such respondents. The list shall be maintained by the district court clerk. Private counsel appointed by the court shall be compensated in the manner set forth in KRS 620.100 (1)(a). If no other method of appointing counsel for the respondent is available, the respondent shall be represented by the public advocate pursuant to KRS Chapter 31.

SECTION 21. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

The respondent shall be present at all hearings unless the respondent and the respondent's attorney waive the respondent's rights to be present, or unless the court makes

a specific finding after the respondent has been brought to the place of the hearing that the respondent should be removed from the hearing because the person's conduct is so disruptive that the proceedings cannot continue in any reasonable manner.

SECTION 22. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

Appeals from the final orders or judgments of the District Court made and entered in proceedings under this chapter shall be taken in the manner as other appeals from District Court to Circuit Court. Appeals may be taken by the Commonwealth, the individual who is subject to the proceedings or the individual's guardian, limited guardian, or other authorized representative. This appeal shall be advanced on the Circuit Court docket without motion or notice.

SECTION 23. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Every resident admitted under the provisions of this chapter shall have an annual review conducted by an interdisciplinary team of the ICF/MR to determine the appropriateness of and the necessity for care and treatment provided the resident in the ICF/MR. On or before the anniversary date of an involuntary admission order entered for a resident pursuant to Section 18 of this Act, and every year thereafter for as long as the resident resides in the ICF/MR, the ICF/MR shall file with the admitting court an interdisciplinary evaluation report on behalf of the resident whose continued placement in the ICF/MR is required. The report shall detail the social, psychological, medical, and other considerations requiring continued placement of the resident in the ICF/MR, a description of the treatment or rehabilitation programs which will benefit the resident as a result of such placement, and a statement that the criteria for involuntary admission set forth in KRS 202B.040 are satisfied. The interdisciplinary report shall list the name and address of the guardian or limited guardian or, if none, an immediate family member of the resident.

(2) The physician shall discharge a resident whose admission is pursuant to court order when it is determined by the interdisciplinary team that the resident no longer meets the criteria for involuntary admission as provided in KRS 202B.040. When a resident is discharged, the ICF/MR shall send notice of the discharge to the court.

SECTION 24. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) No less than once in every five (5) years following the initial order for involuntary admission of a resident to an ICF/MR, or an order authorizing continued care and treatment following review pursuant to this section, the court shall hold a hearing to review the status of the resident and necessity for continued care and treatment in the ICF/MR. Notice at least twenty (20) days in advance of the hearing shall be provided by the court to the ICF/MR, county attorney, guardian or limited guardian of the resident, if any, or, if none, an immediate family member as listed on the last interdisciplinary report filed by the ICF/MR. The court shall appoint an attorney to represent the resident at the review hearing.

(2) The review hearing may be informal and held in open court, in chambers, or at the ICF/MR. The hearing shall be held without a jury and the resident shall be entitled to present documentary evidence and witnesses and cross-examine witnesses against the resident.

(3) At the conclusion of the review hearing, the court shall make written findings of fact concerning whether the criteria for involuntary admission set forth in KRS 202B.040 continue to be satisfied based upon clear and convincing evidence. If the court finds that the involuntary admission

criteria continue to be satisfied, the court shall enter an order authorizing the continued care and treatment of the resident at the ICF/MR and shall establish the period within which the next review shall be held. Otherwise, the court shall enter an order requiring the resident to be discharged from the ICF/MR.

(4) If at any point during the resident's placement at an ICF/MR it appears that the resident no longer meets the criteria for involuntary admission set forth in KRS 202B.040, the resident, the resident's parent, guardian or limited guardian, immediate family member or attorney may request a review pursuant to this section.

SECTION 25. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

At any time, and without notice, a person detained at a facility, or a relative, friend, guardian, representative, or attorney on behalf of such person, may petition for a writ of habeas corpus to question the cause and legality of the detention and request that the Circuit Court issue a writ for release.

SECTION 26. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) A physician may release a resident on convalescent leave status when the interdisciplinary team concludes that the resident would not present a danger or a threat of danger to self, family or others if provided with continued medical supervision in a less restrictive alternative mode of treatment. Release on convalescent leave status does not terminate a court admission order and shall include provisions for the development of a treatment pan jointly by the ICF/MR and by a provider of outpatient care for follow-up care by the provider and for the continual monitoring of that resident's condition by the provider.

(2) The ICF/MR from which the resident is given convalescent leave status may at any time readmit the resi-

dent without additional court proceedings. If there is reason to believe that is in the best interest of the resident to be readmitted, the secretary or an authorized staff physician of the ICF/MR may issue an order for the immediate readmission of the resident. The order, if not voluntarily complied with, shall, upon the endorsement by a judge of any court of the county in which the resident resides or is present, authorize any peace officer to take the resident into custody and transport the person to the responsible ICF/MR. Notice of readmission under this section shall be given to the originating court as soon as practicable and simultaneously with the order directing the readmission if possible.

(3) Release on convalescent leave status shall not apply to persons held under admission orders arising out of KRS Chapter 504 unless consent of the appropriate court is obtained.

SECTION 27 A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

If a resident undergoing involuntary treatment on an inpatient basis is absent from the ICF/MR without or in excess of authorization from the ICF/MR staff, the person in charge or that person's designee may notify the appropriate sheriff or other peace officers who shall take the resident into custody and return the resident to the ICF/MR.

SECTION 28. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

Upon recommendation or approval of the interdisciplinary team of an ICF/MR, a physician may admit for respite care a mentally retarded person. Respite care provided to any mentally retarded person under this section shall not exceed a total of thirty (30) days in any calendar year.

Section 29. KRS 202B.060 is amended to read as follows:

The secretary shall adopt administrative regulations for the proper administration and enforcement of this chapter. *The* [~~Such rules and~~] regulations shall include, but shall not be limited to:

(1) Rights of mentally retarded residents and their families to be adequately informed as to the individual treatment program of the resident;

(2) Rights of residents and their families to assist in the planning of the treatment program of the resident;

(3) Rights of residents and their families under certain conditions to refuse treatment offered to the resident by the hospital or *ICF/MR* [~~mental retardation residential treatment center~~];

(4) Rights of residents to maintain, keep and use personal possessions and money;

(5) Rights of residents to meet with friends and relatives;

(6) Rights of residents to receive payment for work performed on behalf of the hospital or *ICF/MR* [~~mental retardation residential treatment center~~];

(7) Rights of residents to refuse intrusive treatments, including electroshock or psychosurgery;

(8) Rights of residents to seek relief from participating in their treatment plans;

(9) Rights of residents who are minors to seek relief from actions, approved by their parents or guardians, for or against admission and discharge;

(10) The use of seclusion and other mechanical restraints in hospitals and *ICF/MR's* [~~mental retardation residential treatment centers~~];

(11) The release of residents to less restrictive alternative modes of treatment on convalescent status; and

(12) Provisions for alternative methods for involuntary *admission* [~~hospitalization~~].

SECTION 30. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Every ICF/MR approved under the provisions of this chapter shall have a review committee of three (3) qualified mental retardation professionals appointed by the facility director. This review committee shall have the authority to review the appropriateness of a resident's individual treatment plan.

(2) Upon the refusal of an involuntary resident to participate in any aspect of the resident's treatment plan, the review committee shall examine the appropriateness of the resident's individual treatment plan. Within three (3) days of the refusal, the review committee shall meet with the resident and the resident's counsel or other representative to discuss their recommendations.

(3) If the resident still refuses to participate in any aspect of the resident's individual treatment plan, the ICF/MR may petition the District Court for a de novo determination of the appropriateness of the proposed treatment. Within seven (7) days, the court shall conduct a hearing, consistent with the resident's rights to due process of law, and shall utilize the following factors in reaching its determination:

(a) Whether the treatment is necessary to protect other residents or the resident himself from harm;

(b) Whether the resident is incapable of giving informed consent to the proposed treatment;

(c) Whether any less restrictive alternative treatment exists; and

(d) Whether the proposed treatment carries any significant risk of permanent side effects.

(4) Upon completion of the hearing, the court shall enter an appropriate judgment. The proposed treatment shall be authorized if supported by clear and convincing evidence. If the court denies the ICF/MR the right to administer the treatment in question, the ICF/MR may discharge the resident, unless an interdisciplinary team of the ICF/MR determines that an alternative treatment is available and acceptable to both the interdisciplinary team and the resident and would benefit the resident.

SECTION 31. A NEW SECTION OF KRS CHAPTER 202B IS CREATED TO READ AS FOLLOWS:

(1) Legal residents of the state who have become public charges in other states and have been returned to Kentucky because they have been involuntarily admitted may be immediately admitted to an ICF/MR at the request of the secretary or the secretary's designated representative.

(2) Within seventy-two (72) hours, excluding weekends and holidays, of the admission date, the staff of the ICF/MR shall determine the need of the person for further admission. If two (2) qualified mental retardation professionals, at least one (1) of whom is a physician, conclude that the person shall be involuntarily admitted, they shall file in the appropriate court a certification requesting involuntary admission procedures be initiated under the provisions of this chapter, unless the person has agreed to remain voluntarily and possesses the mental capacity to give informed consent for voluntary admission.

Section 32. KRS 202B.050 is amended to read as follows:

All rights guaranteed by KRS [~~Chapters 202A (other than those rights enumerated in KRS 202A.026 and 202A.051) and~~] Chapter 210 to mentally ill persons shall apply to mentally retarded persons.

Section 33. KRS 202B.080 is amended to read as follows:

This chapter may be cited as the "Kentucky Mental Retardation Admission [~~Hospitalization~~] Act".

Section 34. KRS 202B.990 is amended to read as follows:

(1) The unwarranted *admission* [~~hospitalization~~] of any *person* [~~individual~~] under the provisions of this chapter; or

(2) The denial of any *person* [~~individual~~] of any of the rights accorded to him under the provisions of this chapter shall be punished by a fine not exceeding five thousand dollars ($5000) or imprisonment for a term not to exceed five (5) years or both.

(3) Any persons who violates the confidentiality of any mental health record under the provisions of this chapter shall be guilty of a Class A misdemeanor.

Section 35. KRS 387.540 is amended to read as follows:

(1) Prior to a hearing on a petition for a determination of partial disability or disability and the appointment of a limited guardian, guardian, limited conservator, or conservator, an interdisciplinary evaluation report shall be filed with the court. The report shall be compiled by at least three (3) individuals, including a physician, a psychologist licensed or certified under the provisions of KRS Chapter 319, and a person licensed or certified as a social worker or an employee of the Cabinet for Human Resources who meets the qualifications of KRS 335.080 (1) (a), (b) and (c) or 335.090 (1) (a), (b) and (c). The social worker shall, whenever possible, be chosen from among employees of the Cabinet for Human Resources residing or working in the area, and there shall be no additional compensation for their service on the interdisciplinary evaluation team.

(2) At least one (1) person participating in the compilation of the report shall have knowledge of the particu-

lar disability which the respondent is alleged to have or knowledge of the skills required of the respondent to care for himself and his estate.

(3) If the respondent is alleged to be partially disabled or disabled due to mental illness, at least one (1) person participating in the compilation of the interdisciplinary evaluation report shall be a qualified mental health professional as defined in KRS 202A.011 (11). If the respondent is alleged to be partially disabled or disabled due to mental retardation, at least one (1) person participating in the compilation of the evaluation report shall be a qualified mental retardation professional as defined in KRS 202B.010 *(12)* [~~(3)~~].

(4) The interdisciplinary evaluation report shall contain:

(a) A description of the nature and extent of the respondent's disabilities, if any;

(b) Current evaluations of the respondent's social, intellectual, physical, and educational condition, adaptive behavior, and social skills. Such evaluations may be based on prior evaluations not more than three (3) months old, except that evaluations of the respondent's intellectual condition may be based on individual intelligence test scores not more than one (1) year old;

(c) An opinion as to whether guardianship or conservatorship is needed, the type of guardianship or conservatiorship needed, if any, and the reasons therefor;

(d) An opinion as to the length of time guardianship or conservatorship will be needed by the respondent, if at all, and the reasons therefor;

(e) If limited guardianship or conservatorship is recommended, a further recommendation as to the scope of the guardianship or conservatorship, specifying particularly the rights to be limited and the corresponding powers

and duties of the limited guardian or limited conservator;

(f) A description of the social, educational, medical, and rehabilitative services currently being utilized by the respondent, if any;

(g) A determination whether alternatives to guardianship or conservatorship are available;

(h) A recommendation as to the most appropriate treatment or rehabilitation plan and living arrangement for the respondent and the reasons therefor;

(i) A listing of all medications the respondent is receiving, the dosage, and a description of the impact of the medication upon the respondent's mental and physical condition and behavior;

(j) An opinion whether attending a hearing on a petition filed under KRS 387.530 would subject the respondent to serious risk of harm;

(k) The names and addresses of all individuals who examined or interviewed the respondent or otherwise participated in the evaluation; and

(l) Any dissenting opinions or other comments by the evaluators.

(5) The evaluation report may be compiled by a community mental health-mental retardation center, a licensed facility for mentally ill or developmentally disabled persons, if the respondent is a resident of such facility, or a similar agency.

(6) In all cases where the respondent is a resident of a licensed facility for mentally ill or developmentally disabled persons and the petition is filed by an employee of that facility, the petition shall be accompanied by an interdisciplinary evaluation report prepared by the facility.

(7) Except as provided in subsection (6) of this section, the court shall order appropriate evaluations to be performed by qualified persons or a qualified agency. The

report shall be prepared and filed with the court and copies mailed to the attorneys for both parties at least ten (10) days prior to the hearing. All items specified in subsection (4) of this section shall be included in the report.

(8) If the person evaluated is a poor person as defined in KRS 453.190, the examiners shall be paid by the county in which the petition is filed upon an order of allowance entered by the court. Payment shall be in an amount which is reasonable as determined by the court, except no payment shall be required of the county for an evaluation performed by a salaried employee of a state agency for an evaluation performed within the course of his employment. Additionally, no payment shall be required of the county for an evaluation performed by a salaried employee of a community mental health-mental retardation center or private facility or agency where the costs incurred by the center, facility, or agency are reimbursable through third-party payors. Affidavits or other competent evidence are admissible to prove the services rendered but not to prove their value.

(9) The respondent may file a response to the evaluation report no later than five (5) days prior to the hearing.

(10) The respondent may secure an independent evaluation. If the respondent is unable to pay for such evaluation, compensation for the independent evaluation may be paid by the county in an amount which is reasonable as determined by the court.

Section 36. The following KRS section is repealed:

202B.020 Hospitalization for mentally retarded—Court examination.

/s/ Donald J. Blanford
Speaker-House of Representatives

/s/ Brereton C. Jones
President of the Senate

Attest: /s/ Evelyn Marston
Chief Clerk of House of Representatives

Approved: /s/ Wallace G. Wilkinson
Governor

Date: 3/22/90

DEPOSITION OF THOMAS HORTON

Direct Examination:

8

• • • • • • •

Q Yes, that's exactly it. Let's talk then for a few minutes about your daughter. Her name is Tracy?

A Teresa Ann. Tracy is a nickname.

Q What's her birthdate?

A April 27th, 1965.

Q And I understand that she is mentally retarded?

A She is mentally retarded. Diagnosed at the age of one.

Q You answered my next question. Do you recall what her highest level of function is in terms of

9

IQ or classification of mentally retarded persons?

A She's at her highest level now of IQ. There was a time when she functioned a little better physically but that was when she was quite small and that as she grew larger then her physical abilities just evaporated. When she was a little child she could support her weight, not walking but standing up to a chair. I'm talking about when she was two years old she could stand up to a chair. As she grew larger she couldn't begin to support herself. So her physical capabilities just peaked I would say at the age of two.

Mentally, I guess it's safe to say she—I don't know. I'm not qualified to say. She's never been able to speak, never been able to indicate to us. We don't know what she can see, don't know what she can hear. In my judgment she's at—attained her peak as a child and has remained there.

Q Does she function well enough to be tested?

A No. She has been tested by the Jefferson County School systems when she entered the program out there at Tully's. They evaluated her, but it's a passive process. You know, the psychologist could do the testing. They're qualified and they rated her as on a three months—is that what it was? Three months

10

development, mental development and I have to think as much—I have to think they're right. I have never seen any evidence that Tracy was any more than that.

Q How old was Tracy when you and Mrs. Horton first started discussing the fact that you would not be able to continue to care for her at home and would need to seek a place for her care or rehabilitation outside the home?

A Well, I think we were like any naive young parents. We didn't really realize what kind of problem we were dealing with. We knew that Tracy was developing slowly, but by the time she was one year old she showed no signs of walking. So we took her down to UK Medical Center and they diagnosed her as being profoundly retarded and having Cerebral Palsy. We accepted Tracy as a special package of joy that we were going to raise as best we could.

We realized early on that there were no facilities whatever in the city of Ashland for a child like Tracy. They just are nothing. Later on after we left Ashland they opened a CP school, but they had nothing for her. We felt that we were going to have to move to a larger city to find any kind of services for Tracy, so we moved to Louisville in 1970. We went to the old CP facility down on Fourth Street and we visited the

11

sheltered workshop out by the State Fairgrounds off Crittenden Drive and we visited the CP school on Newburg

Road and Tracy didn't—she wasn't acceptable for any of those programs. She wasn't—she didn't have the development, you know, to go sheltered workshop. And see, bear in mind, this was before the Federal Government manned the Equal Educational Opportunities for the Disabled.

Q How old was Tracy when you returned to Louisville or moved to Louisville?

A She was born in '65 and we moved to Louisville in 1970, so she was five when we moved here; is that right?

Q Can you describe for us how she was functioning physically and mentally at age five when you went back to Louisville?

A It's not back to Louisville. We're not natives of Louisville. We're natives of Ashland. So we moved here in 1970. Tracy never, as I said, when she was a little child she could stand up to a coffee table. She could pull herself up and stand up to that coffee table. That's as far as she ever got at any—what might be remotely described as ambulation. She, as I recall, we had to carry her everywhere she went, everywhere. She could crawl around the room and if you enticed her she

12

might crawl to you but she might just as readily crawl in the opposite direction. She suffered from frequent respiratory problems. Apart from the colds and the pneumonia, you know, she probably was relatively healthy. She had really bad teeth, no gum development whatever. That was a problem that—as a matter of fact shortly after we moved to Louisville we had to take her down and have a gingivectomy done, which hurt us a lot worse than it did her I think. That was an excruciating thing. But Tracy never—she just never developed physically. She grew larger, but she never really developed much physical capacity.

• • • • • • •

13

• • • • • • •

Q Would you tell us about the program at that school?

A Well, I guess, you know, you're more

14

tuned into this than I am. I guess there was a court case and I guess the Federal Government or the Supreme Court ruled that every child in the United States had to be given the opportunity to learn, to go to school and to learn at his level. So anywhere there was an infusion of money into these programs. They opened two wonderful schools here in Louisville, Churchill Park School and Tully School. In the beginning Tracy was in the old J-town High School and then later on they opened the new school out there, but it was—they had full staff our there, a principal administrator. They had physical therapists. They had occupational therapists. They had a dietary program. They had training programs. They had a swimming pool. They have a kitchen out there kind of like a McDonald's where they can take a retarded individual and teach him how to cook maybe. I mean teach him at his level and they had all manner of children out there. Some of the profoundly involved and some that were minimally involved and Tracy was always those most profoundly involved.

So I'm guessing, Sharon is not helping me, but I think in the late '70's is when this program became available and they had a bus. They had buses, lift vans and they came to the house—little yellow vans with—the first one didn't have a lift. We had to lift

15

her up into the thing. Later on they had lift buses. So she was in a regular nine month program. The bus came to the house in the morning. Took her to Tully and brought

her back in the afternoon Monday through Friday. And she was permitted to stay in this, I think two years beyond normal graduation; is that right, Sharon, age 20, 21?

Mrs. Horton: Twenty-one.

A Age 21. She was permitted to stay in this until age 21 and then she had to leave.

Q During that time would that therapy with the other treatment that was available at the Tully School, did she ever obtain the ability to speak?

A No, She never did speak, but we believe that socially and physically this was probably the peak time of her life, those years at Tully.

Q Why do you say that?

A Well, we noticed that when she was in the Tully program she would come home and they would kind of wear her out. We noticed she slept very well, but also in the summertime when school was not in session, she became much more lethargic, less animated, more drowsy. It seemed that we believed that the social aspects of it, and of course, the exercises that the—all the noises and sounds and the activity and the social aspects was what caused her to be improved and we felt that in the

16

summertime, when there was no program here, that she just went down hill. She would drool a lot more. She would sleep more. She would crawl less. Just generally she just would kind of curl up in the floor in the summertime. I don't know, just less animated and more animated in the wintertime while she was in school. Whether we were right or wrong about that, it was conjecture. We think we were right. We could not notice a definite difference in her when school was not in session. I mean she wasn't being stimulated at home the way she was at school.

Q What was it like providing for a mentally retarded adult at home?

A Well, you can imagine it. Tracy has no self-help skills. We had to get her up in the morning, diaper her, wash her up, feed her her breakfast one spoonful at a time, dress her, get her strapped in her wheelchair and wait on the schoolbus. When there was no school, we put her down on the floor or let her sit in her wheelchair and alternate it. She liked to watch T.V. We don't know what she got out of it other than the noise and maybe the color, but she would watch T.V., nap a lot, crawl through the house a little bit and then as she got larger she crawled less and less. Toward the end she wasn't crawling at all, but anyway I'm getting ahead of myself.

17

A typical day when she was in session we get her strapped in the wheelchair, get her coat on her and get her out to the bus. On weekends when school was not in session we would get her dressed and let her sit in front of the T.V. and watch T. V. or her mother would just bring her over in the kitchen and just talk to her. But that was kind of a typical day for her. She had to be diapered several times each day. She had to be bathed and she had to be fed three times plus a bedtime snack. She had to be given her medication without fail. She's been on tranquilizers since she was a baby or since she was one year old she's been on tranquilizers.

Q What would her medicine regimen be like?

A She would take a Mellaril, which is a tranquilizer or she took Dolatin for some years. She took Phenobarbital. It would generally be given at meal times, I believe, three times a day or two times a day; isn't that right? She didn't take a pill at bedtime. She took her medicine at meal times. And she's been on that Mellaril for years and years

and to my knowledge is still on it today. She's had a lot of skin sensitivities over the years, many, skin problems and I think she inherits those from her Grandfather, my Father, who was killed. My father died prematurely as a direct result of

18

skin problems and I inherited those skin problems, not nearly like my Father had. And now Tracy has skin sensitivities and she'll develop rashes and everything in the world. Anyway that's probably under much better control than in my Father's time.

Q How did those skin problems evidence themselves when she was living at home with you?

A Well, she in the moist areas of her body, under her arms, behind her knees, behind her ears she would get a red raw area behind her ears and we had to medicate those with ointment. She had, for years and years and years she had what's called a Cradle Cap, little infants get Cradle Cap. Now Tracy kept it into adulthood and still has it to this day and on occasions a real scaliness and when you scratch it away just reveals raw skin. She's had to have special shampoos administered to her to control her scalp problems. I'm just absolutely convinced she inherited that from my Dad. My Dad had Eczema really bad and it killed him in the days before there was penicillin. And I've been on skin medication since I was a young man. My problems are nothing compared to my Dad's and Tracy's.

Tracy's other big health problem that I can recall is she had an ongoing lung problem, pulmonary problem. She has had very frequent pneumonia and that's

19

because for obvious reasons she's always—she never developed her lungs, never developed her muscles, never learned how to do controlled breathing, on her back very, very

frequently or on her stomach. She's in a prone position very frequently. When she's in a wheelchair she's slouched, so her chest is just caved in and she never developed those lungs and I have no idea how many times she had had pneumonia over the years. I would say dozens of cases of pneumonia since her childhood and that seems to go on. It goes with the—it goes with her retardation. It is directly related to it. There's little we can do other than just give her antibiotics.

Q Did you observe any symptoms of Cerebral Palsy other than—

A Yes. As a matter of fact when she was diagnosed—that's her official diagnosis. She has Cerebral Palsy with profound Mental Retardation. Is that right? Yeah, that was—when we had her diagnosed at the UK Medical Center that was the diagnosis, Cerebral Palsy. I heard about Cerebral Palsy, but didn't know what it was and they said it's brain damage. The child was born with brain damage. It comes in all sorts of degrees and your child has it in the worst possible degree.

Q Tell us then how it was that you and Mrs. Horton came to the decision that you could no longer

20

care for Tracy at home?

A Well, we felt that the program at Tully was really benefitting her and that that structured activity, that structured physical therapy, the structured occupational therapy she was given and the social setting really helped her development. As I said we noticed that she deteriorated in the summertime.

There came a time when Tracy had to leave Tully because of her age and this coincided with—this coincided with a deterioration in her physical condition. Then that winter, was that the winter of '86? I don't know. We'll get

to that in a minute. Tracy turned—her birthday was in April so she would have had to leave school at the end of that school year which was probably in late May, I guess. That winter, that winter she started getting sick again and this was something we experienced many, many times, but it was worse than it had ever been before. She had always, for years and years and years, she had what are called bed sores or decubitus ulcers on the pressure points. She had a couple at the base of her spine just above her buttocks, which I think that's called the coccyx area. She had always had a bed sore there and she had a couple on her hips for as long as we could remember, but they were bigger and uglier and more open and running than we had ever seen before.

21

We had been treating them for years in our incompetent way. But this time we just couldn't seem to get them to stop. They just got worse and I had her seen by a doctor and we were given medication to use. At the same time she was getting more and more congested, that deep croupiness that we had experienced before, but it seemed to be worse than it had ever been. Her limbs started swelling. This didn't start that winter. Her limbs had been swelling off and on for years. She often had swollen limbs, but this time it was worse than it had ever been. Her doctors said that she simply had congestive heart failure and it was a part of her condition that her heart wasn't developed and because of all the water in her lungs it was something we were going to have to try and fix and deal with.

So there were a culmination of things that were going on. Her condition was just going downhill fast and we didn't seem to be able to do anything about it. And we really, for the first time, I think that winter—we had always accepted the fact that Tracy—let me back up. When the doctor diagnosed Tracy at the age of one, I recall in my

naive way I recall asking the doctor how long is Tracy going to live. And he said, Mr. Horton, I can't tell you. He said I could tell you that people with your daughter's problem do not live a normal life. You know, but that's all I can tell you. She may

22

live into her 40's. She may not live to be five. She may die a natural death. So that's all, but we had always accepted the fact that Tracy wouldn't live a normal life.

But I think it was that winter that we really became aware for the first time that she was quite mortal and that her physical problems seemed to be accelerating and piling one on top of the other. So anyway, Tracy would have been forced to leave the school system in May and I think we pulled her out of school along about March. She became so sick that we just pulled her out of school and she never went back. We pulled her out late that winter, I guess it was after Christmas. She didn't finish that schoolyear. And the physical problems just seemed to—they just continued. Her legs were just swollen constantly and they go down briefly but then they swell back up again.

So there came a time when we realized after Tracy was out of a structured program that she wasn't getting any better, she just simply wasn't. It really bothered us that Tracy needed a structured program, but she also, we thought, badly needed regular medical care. I mean she needed nursing care that we were no longer able to give her. We were just in over our heads. While she was being seen by a doctor, there's so much that a doctor can do, and we felt, we knew all along, we knew

23

that Hazelwood was in Louisville. The presence of the facility in Louisville was one important reason why we

moved here, but Hazelwood did not exist when we moved here. We moved here in 1970. I don't think Hazelwood came into being until '71 or something. We came here because of the CP school and the other facilities that were available. So we just felt that—we talked to people. We picked as many people's brains as we could and they would say this child is going to need unremitting medical care probably for the rest of her life and you're doing—not only you're doing yourselves a disservice, but you're doing her a disservice and to deprive her of the medical care she needs.

Our house, our home was ill-equipped to deal with a child like her. We had—our bathing facilities were just terrible. As a matter of fact we couldn't even give her a bath. It was that bad. We had her in a hospital bed. She had been in a hospital bed for years and years, but anyway, I forgot what your question was, but there came a realization that Tracy needed the kind of help, medical help that we couldn't give her anymore. We were genuinely alarmed about her condition. We really were.

• • • • • • •

27

• • • • • • •

Q Did the social worker that came to talk to you describe any other types of placements that might be available for Tracy aside from Hazelwood?

A She said that there were other programs available but not for a child like Tracy and they were not available at that time. She said, you know, for Tracy's particular needs, for her chronic health needs that I see right now Hazelwood is all we have. She said there are alternative programs, but nothing for her. I could tell that—I could tell that the social worker was trying to be very balanced in the advice she was giving us. She didn't want to talk Hazelwood up and she didn't want to talk it down. She

said here are the resources that are available that you have to decide and all of us have to decide what's best for her. But I thought she tried to be

28

very careful and I guess that's necessary. It's a somber decision you have to make.

• • • • • • •

31

• • • • • • •

Q Tell us about the trial to have her declared to be disabled.

A Well, we were just appalled. We couldn't believe it. We thought, my God, the judge looks at this child and examines her and talks to her. She cant's talk obviously. I mean it's clear that the child is totally, permanently disabled. We thought he signs a paper and that's the end of it, but it wasn't that way at all. Sharon had to go on the witness stand and I thought treated pretty badly. Anyway Tracy's council in talking to the jury never did say don't do this. She said to the jury that be aware of what you're doing, be aware of the seriousness of what you're doing. If you declare somebody disabled you're taking away their right to vote. You're taking away their right to ever enter into a contract. You're taking away their right to marry and two or three other things. So anyway the jury declared her total, permanently disabled. Judge Merrill signed the order and I guess that was in the fall of '86 I suppose. I guess that's when that was. But it was—we just weren't in any way braced or prepared for what we were going to encounter. We didn't know there was going to be an

32

adversarial proceeding. We thought anybody with eyes in their head would see that this child is profoundly retarded, you know.

Q Did you find it to be adversarial in nature?

A Oh, yeah. I mean Sharon was treated as of she were a cruel Mother. What kind of parents would do this to a child. It was extremely adversarial.

• • • • • • •

38

Q After the court made the finding of probable cause I assume that Tracy remained at Hazelwood?

39

A She remained at Hazelwood. The first trial was scheduled, which was to be a 60-day commitment there.

Q Was that a jury a trial too?

A That was a jury trial. The probable cause hearing at Central State was not a jury trial, but this trial was a jury trial and I guess of a jury of six. This was held at the courthouse building.

Q Was Tracy represented by counsel?

A Tracy was represented by counsel, Rita Ward. Rita Ward represented Tracy throughout all of her travails or our travails of this whole period. So beginning with the second trial is when the anguish really came home. It was nothing—the guardianship trial, which we thought was so brutal, so hard on us, was nothing compared to these jury trials. You're talking about strong, harsh cross-examination of the Mother, and just accusations, insinuations that we were bad parents and the attorney on more than one occasion said to the jury, what kind of a parent would put a child in an institution. What kind of parent would do that? Have you all ever seen Hazelwood? Those concrete block walls out there and that drab, dreary environment. Who would do that? What kind of parent would do that? We were just held up to ridicule and scorn, we thought, and bear in mind that we were

40

obviously oversensitive to this, extremely oversensitive. It was the most emotional and traumatic thing ever, but bearing in mind we were oversensitive. I still believe everything I'm telling you, that we were—we believe we were treated very badly by this whole process and I think that our system has to show sensitivity to these parents, like ourselves who come into this process so distraught and carry so much emotional baggage. We don't think we ought to be treated this way. We were treated badly we thought, but the jury held that she should be admitted.

Q You mentioned just a second ago that the parents of mentally retarded children like yourselves go into these proceedings carrying a lot of emotional baggage. What do you mean by that?

A Well, we're filled with guilt over the fact that number one we had a retarded child, so that makes you think there's some kind of defect in your genes or in your family history. You know, you're always wondering what caused this and I know I talked to my Mother. Did we ever have anybody in our family that was retarded and she said well, you had a second cousin that was spastic. You start looking at all these things and then you wonder about—the Mother wonders what did I do? Did I do something silly? Did I go swimming or did I lift

41

something I shouldn't have. You always are questioning whether you did something or you might have done something or something you ate or something you drank. Back then, you know, there were few precautions and few restrictions on what you did. They just said take care of yourself and don't do anything stupid, you know, don't go mountain climbing, you know. Now, we know of a lot of things that we eat and drink, but we didn't know that and we still don't know that. So you're always wondering what

did we do or what did we not do that might have caused this child to be retarded.

And then second and even worse is the growing realization that you're not capable of meeting her ongoing needs and that gives you some guilt. You know, when you realize we don't—we're not physically equipped, we're not psychologically equipped, we're not emotionally equipped. We don't have the professional training to meet this child's needs on an ongoing minute to minute, day-to-day basis. And that makes us feel guilty because, you know, you want to be able to care for your children, and you know, using whatever gifts God has given you, whatever intelligence and energy God has given you is to care for your children and that's hard when you recognize you can't, and things have gotten out of control and you're not up to it anymore. And we've had a lot of

guilt about that and that's something we'll have for the rest of our lives, you know, that we might have caused her retardation and we were unable to do everything that she needed. It's very difficult to entrust your child to someone else. We were used to sending our children out of the nest and seeing them marry a man or woman and turn them over to some adult, you know, to go on to a happy life and it's difficult to turn your child over to an institution to meet her very basic needs just because you're not able to anymore. But you know, we would never ever, ever have taken Tracy to Hazelwood if we weren't convinced that's what she needed. This was a act of love, you know, in taking her out there. Our child was dying. There was no doubt in our mind that she was.

Q Did any of the medical experts that treated her or that evaluated her as part of the guardianship proceeding or the involuntary commitment process disagree with the decision to place her in Hazelwood?

A No, as a matter of fact our doctor had urged Sharon to do that for sometime. I mean he wanted her to recognize that it was going to come to that she couldn't care for Tracy and he said there's going to be a time when you can't meet this child's needs and I can remember her—we didn't have a pediatrician. We had a

GP who served as our pediatrician and he told us when Tracy was an infant, right after she was diagnosed, that you ought to consider—you ought to consider putting her in an institution and we would have no part of that. We were just determined we were going to care for her for as long as we were humanly able to.

. . . . . .

Civil Action No. C 82-0738-L(A)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al. - - - - - - - - *Plaintiffs,*

v.

HARRY J. COWHERD, M.D., Secretary,
Cabinet for Human Resources - - - *Defendant.*

MEMORANDUM OPINION

This class action pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, challenging the procedures governing admissions and discharges at Kentucky's Mental Retardation Residential Treatment Centers [hereinafter "MRRTCs"] is submitted to the Court on plaintiffs' motion for summary judgment and preliminary injunction. For the reasons set forth below, the Court will enter partial summary judgment in favor of plaintiffs and a preliminary injunction in accordance with that partial judgment.

Plaintiff Doe filed this action in 1982 alleging that the procedures by which he and others had been admitted and retained at Kentucky's MRRTCs were unconstitutional. In a memorandum opinion entered November 20, 1986, this Court held that mentally retarded adults are entitled to a "judicial hearing and determination of the propriety of the commitment," either prior to the involuntary commitment or as soon as practicable thereafter. *Doe* v. *Austin*,[1] 668

[1]Defendant Cowherd, Secretary of the Cabinet for Human Resources, was substituted for his predecessor, Elbert Austin, pursuant to Fed.R.Civ.P. 25 (d)(1).

Supp. 597, 600 (W.D. Ky. 1986), *aff'd in part, rev'd in part,* 848 F.2d 1386 (6th Cir.), *cert. denied,* 109 S.Ct. 495 (1988).

We also held that contrary to the 1986 amendments to K.R.S. 202B, applications by parents or guardians for commitment of mentally retarded family members or wards are *not* voluntary commitments, *id.;* that the Equal Protection Clause requires a judicial hearing and determination prior to commitment, *id.* at 601; and that the Due Process Clause requires periodic review of any commitment decision. *Id.* We, therefore, enjoined the defendant Secretary from committing allegedly mentally retarded adults to any MRRTC without first providing a judicial hearing to determine whether such individuals should be committed. *Id.* at 602.

On appeal, the United States Court of Appeals for the Sixth Circuit agreed that commitments of mentally retarded adults on applications by parents or guardians are, in actuality, involuntary. *Doe* v. *Austin,* 848 F.2d 1386, 1392 (6th Cir.), *cert. denied,* 109 S.Ct. 495 (1988). The Court of Appeals also agreed that Kentucky's procedures did not conform with the requirements of due process. *Id.* at 1394. As explained by the Sixth Circuit, although due process does not require full-blown judicial hearings prior to involuntary commitments of mentally retarded adults, due process does require that "mentally retarded adults in Kentucky receive, at a minimum," the six procedural safeguards established in *Vitek* v. *Jones,* 445 U.S. 480, 494-95 (1980).[2] *Doe* v. *Austin,* 848 F.2d at 1393-95.

[2]In *Vitek* v. *Jones,* the Supreme Court affirmed the district court's decision that due process was violated by a statute allowing the transfer of a prisoner to a mental facility upon a finding by a physician that the prisoner suffered from a "mental disease or defect" and could not be given "proper treatment" in the prison.

(Footnote continued on next page)

Finally, the Sixth Circuit held that because Kentucky provides judicial hearings for the admission of *mentally ill adults to mental* health facilities, equal protection requires that Kentucky also provide judicial hearings for the admission of mentally retarded adults to MRRTCs. *Id.* at 1394-95. Likewise, the Sixth Circuit held that as Kentucky provides periodic judicial review for committed mentally ill adults, equal protection requires that Kentucky also provide some form of periodic review for committed mentally retarded adults. *Id.* at 1394-96. As to the formulation of these review procedures, the Sixth Circuit remanded the matter on the grounds that such a task was best left to the district court as it would have the benefit of compliance plans submitted by the parties. *Id.* at 1396 n.9.

Following the Supreme Court's denial of the Secretary's petition for a writ of certiorari, the parties began negotiating a compliance plan to implement the above-referenced holdings. In September 1989 they submitted a proposed Agreed Final Compliance Plan. This plan proposed procedures different from those enjoined and would have required Kentucky to give the same rights to mentally retarded

---

(Footnote continued)

Doe v. *Austin*, 848 F.2d 1386, 1393 (1988), quoting *Vitek*, 445 U.S. at 483-84. The Supreme Court also approved the following procedures: (1) written notice of proposed action; (2) a subsequent hearing at which evidence relied on is presented, and the prisoner is allowed to testify and to present documentary evidence; (3) an opportunity to present witnesses on one's own behalf and to cross-examine adverse witnesses; (4) an independent decisionmaker who also has the authority to implement the decision; (5) a written statement by the factfinder setting forth the evidence and the reasons for the decision and transfer, if any; and (6) qualified and independent assistance provided to the prisoner. *Doe*, 848 F.2d at 1393-94, citing *Vitek*, 445 U.S. at 494-95.

adults with respect to involuntary commitments as is given to mentally ill adults.

However, in the meantime, the 1990 Kentucky General Assembly enacted House Bill 511 [hereinafter "HB 511"], an entirely new version of K.R.S. 202B for governing admissions and discharges of mentally retarded persons. Under HB 511, codified as the 1990 amendments to K.R.S. 202B, the previous incorporation by reference in K.R.S. 202B.050 to the rights of mentally ill persons established in K.R.S. 202A was totally eliminated.

Plaintiffs contend that under HB 511, they "again lack procedural protections" in admissions and discharges at MRRTCs. According to the plaintiffs, under the new law the rights of mentally retarded adults to the safeguards found in the civil commitment procedures afforded to mentally ill adults under K.R.S. 202A have been impermissibly narrowed to such a degree that their constitutional rights are once again at issue. Plaintiffs' Mem. at 4.

Plaintiffs first challenge the voluntary admission procedure established in § 4 (2) of HB 511 for admission of mildly or moderately mentally retarded adults without a judicial hearing. Section 4 (2) provides, in pertinent part, as follows:

> Upon the recommendation or approval of the interdisciplinary team of an ICF/MR,[3] a physician may . . . admit a mildly or moderately mentally retarded adult person who applies voluntarily [for admission] and who, in the opinion of the physician, possesses the mental capacity to give informed consent for admission.

---

[3]Although HB 511 amends MRRTC to ICF/MR [Intermediate Care Facility], this opinion will continue to use the MRRTC terminology.

Plaintiffs argue that this procedure conflicts with this Court's prior opinion and order and fails to provide procedures for safeguarding against the risk that a so-called voluntary admission would be "neither informed nor truly voluntary." Plaintiffs' Mem. at 8. Plaintiffs contend that the holding in the memorandum opinion entered January 9, 1986, was different from the holding in the memorandum opinion entered November 20, 1986, in that the latter opinion held that *all* mentally retarded adults, not only *mildly or moderately* retarded adults, were entitled to judicial hearings prior to admission. *Doe* v. *Austin*, 668 F.Supp. at 602.

After reviewing these opinions, this Court is convinced that its intent consisted of requiring judicial hearings only for those mentally retarded adults who could not *personally* apply with informed consent for voluntary admission. *See also*, Defendant's Mem. at 11-13. Therefore, the Court finds no conflict with its prior order. Likewise, the Court believes the new procedure under § 4(2) granting voluntary admissions where a staff physician makes the determination of an applicant's mental capacity for informed consent does not violate the Constitution.

Plaintiffs direct their next argument to the fact that HB 511 does not contain any provisions allowing voluntarily admitted residents to be released upon their own request. The absence of such a provision is in contrast to K.R.S. 202A.021(3) allowing the discharge of voluntarily admitted mentally ill patients who request release in writing. Plaintiffs contend that under § 4 (3) of HB 511, mentally retarded adults who voluntarily enter MRRTCs surrender their ability to leave the facility voluntarily.

Section 4 (3) provides as follows:

> Upon recommendation or approval of the interdisciplinary team of an ICF/MR, the physician shall discharge any voluntarily admitted resident whose care and treatment in the ICF/MR is determined to be no longer necessary or advisable.

In response to plaintiffs' arguments and concerns, the defendant Secretary admits that:

> he would have no authority to detain a voluntarily admitted patient who requested discharge without implementing the involuntary admission procedures contained in House Bill 511. The only basis for permitting the voluntarily admitted patient to receive treatment and habilitation . . . would be the patient's consent. . . . Once that consent is withdrawn, defendant would have no choice but to immediately discharge the patient or institute involuntary admission proceedings.

Def.'s Mem. at 17-18.

The Secretary further admits that "persons voluntarily admitted to CHR's mental retardation facilities have a right to release upon their request." Def.'s Mem. at 18, citing *Kentucky Ass'n of Retarded Citizens* v. *Conn*, 510 F.Supp. 1233, 1249 (W.D. Ky. 1980), *aff'd*, 674 F.2d 582 (6th Cir. 1982), *cert. denied*, 459 U.S. 1041 (1982). Despite this admission, the Secretary also argues that mentally retarded adults "have other constitutional and federal statutory rights not specified in House Bill 511," and the statute's silence as to those other rights does not mean that the Kentucky legislature intended to eliminate those rights "merely by failing to enumerate" them." Def.'s mem. at 18.

The Court disagrees. The right to release upon request is an extremely important right; and in this Court's opinion, it cannot be protected by statutory silence. Moreover, the Court also believes the Secretary's assurances that the right of release will be honored represents an inadequate basis for protecting the right, especially in the face of a statutory provision conditioning discharges of voluntarily admitted residents on actions by the facility's interdiscipli-

nary team. Therefore, we hold the § 4 (3) of HB 511 is unconstitutional to the extent that it governs the release of voluntarily admitted adults without any reference to such residents' right to release upon request.

Plaintiffs next argue that HB 511's use of the clear and convincing standard of proof for involuntary commitments of mentally retarded persons violates equal protection. For the involuntary commitment of mentally ill persons, the Kentucky legislature mandates that the manner of the proceedings and the rules of evidence shall be the same as in any criminal proceeding, including the evidentiary burden of beyond a reasonable doubt. K.R.S. 202A.076(2). The legislature's enactment in § 15 (2) of the lower clear and convincing standard for the civil commitment of mentally retarded individuals thereby denies protection provided by state law to the mentally ill. Plaintiffs contend that no legitimate state interest is served by the lower burden of proof placed upon Kentucky. Nor can the state, according to plaintiffs, demonstrate a rational basis for distinguishing between the mentally ill and the mentally retarded. We also agree with plaintiffs that the threat to personal liberty is identical for both classes of persons.

The Secretary defends the lower burden of proof by pointing to *Addington* v. *Texas*, 441 U.S. 418 (1979), which holds that the Due Process Clause of the Fourteenth Amendment requires the use of the clear and convincing standard of proof in civil commitment proceedings involving the mentally ill. *Id.* at 431-32. However, as this Court reads *Addington*, it does not prohibit the use of the criminal reasonable doubt standard. Rather, as stated by the Supreme Court, "the substantive standards for civil commitment may vary from state to state, [and] procedures must be allowed to vary so long as they meet the *constitutional minimum.*" *Id.* at 431 (emphasis added). Here, the Kentucky legislature has elected to distinguish between mentally ill persons and mentally retarded persons, a situation which the *Addington* Court did not address.

This Court believes that *Doe* v. *Austin*, 848 F.2d at 1394, citing *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), mandates that mentally retarded persons be afforded the same protections as are mentally ill persons when facing involuntary commitment. Although differences admittedly exist between mentally ill and mentally retarded persons, "mere identification of differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.'" *Doe* v. *Austin*, 848 F.2d at 1394, quoting *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

Here, while it may be true that mental retardation is easier to diagnose then mental illness, and further, that it is easier for a factfinder to reach a decision with reference to mental retardation then with reference to mental illness, we believe such facts are of constitutional significance only in determining how often to review the commitment of persons who are mentally retarded.

Under Kentucky law, "when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution." *Denton* v. *Commonwealth*, 383 S.W.2d 681, 682 (Ky. App. 1964); *see also, Messer* v. *Roney*, 772 S.W.2d 648 (Ky. App. 1989). In a criminal action, only two parties are involved: the government and the accused. If a judgment of acquittal is entered, the case ends. An appeal is not permitted. Here, we believe those protections which are given to mentally ill persons must be extended to mentally retarded persons facing civil commitment proceedings.

We, therefore, hold that § 15 (2) of HB 511 allowing mentally retarded persons to be committed under the clear and convincing standard of proof is unconstitutional under

the Equal Protection Clause. We also hold unconstitutional under equal protection and due process §§ 13, 15 (3), and 22 of HB 511 allowing third parties, for example, parents or guardians, whose interests may be adverse to the mentally retarded person facing commitment, to participate in all aspects of the proceedings "as if" parties, including appeals of decisions they regard as adverse.

Finally, we address plaintiffs' argument that § 20 of HB 511 violates the Equal Protection Clause by denying to mentally retarded persons confronted with involuntary commitment proceedings legal services and representation provided by the Kentucky Department of Public Advocacy except as a last resort, that is, only after it is determined that private counsel is unavailable, either through court appointment or by inability to retain. This provision is in contrast to K.R.S. 202A.121, which automatically gives to mentally ill persons facing involuntary commitment hearings legal counsel from the Department of Public Advocacy. Although mentally retarded persons or those acting on their behalf might prefer legal services from the Department of Public Advocacy, we do not believe that § 20's directives deprive mentally retarded persons from receiving effective legal assistance. As such, we do not regard § 20 as violative of the Constitution.

We have entered this date partial summary judgment for the plaintiffs in accordance with this opinion and a preliminary injunction in accordance with the partial summary judgment.

Date: July 1, 1991

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

Civil Action No. C 82-0738-L(A)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

SAMUEL DOE, et al. - - - - - - - - - *Plaintiffs,*

v.

HARRY J. COWHERD, M.D., Secretary,
Cabinet for Human Resources - - - *Defendant.*

PARTIAL SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION

This action having come before the Court on plaintiffs' motion for summary judgment and preliminary injunction, and the parties having submitted their memoranda, responses and replies, and the Court having entered its memorandum opinion, accordingly,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Plaintiffs are granted partial summary judgment and a preliminary injunction in accordance with that judgment as set forth below in subsections 2 and 3.

2. Sections 13, 15 (2), 15 (3), and 22 of House Bill 511 are unconstitutional; and therefore, defendant is enjoined from applying or enforcing these provisions.

3. Section 4 (3) of House Bill 511 is unconstitutional inasmuch as it provides for the discharge of voluntarily admitted mentally retarded adults without stipulating that such residents have a right to release upon their own request; and therefore, defendant is enjoined from using or

applying this provision where a voluntarily admitted mentally retarded resident requests release.

4. Plaintiffs are denied their motion for summary judgment on the other challenged sections of House Bill 511.

5. Pursuant to Fed.R.Civ.P. 65(c), plaintiffs shall give security in the amount of One Hundred Dollars ($100.00)

Date: July 1, 1991

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-5932

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL DOE, by his mother and next friend, Mary Doe, on behalf of himself and all others similarly situated, - - *Plaintiffs-Appellees,*

v.

HARRY J. COWHERD, - - - - *Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

OPINION—Decided and Filed June 1, 1992

Before: KEITH, Circuit Judge; LIVELY, Senior Circuit Judge; and COHN, District Judge.*

KEITH, Circuit Judge. Defendant Harry J. Cowherd ("defendant") appeals the judgment of the district court ordering the State of Kentucky to amend its release and admissions procedures for mentally retarded persons at the State's institutions. For the reasons outlined below, we AFFIRM in part and REVERSE in part.

---

*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

This is a class action brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. Plaintiff Samuel Doe ("plaintiff") is a mentally retarded adult who currently resides in a Kentucky Mental Retardation Residential Treatment Center ("RTC"). Plaintiff represents a class of citizens who are similarly situated to him as involuntarily committed adults in a Kentucky RTC. Defendant is Secretary of the Kentucky Cabinet for Human Resources. He appeals the July 1, 1991, judgment of the district court for partial summary judgment and preliminary injunction in favor of plaintiffs. The district court ordered the State of Kentucky (the "State") to amend its procedures for admissions and release of both voluntary and involuntary adults at RTCs.

The issues raised by the instant case stem from issues previously addressed by the Court in *Doe* v. *Austin*, 848 F.2d 1386 (6th Cir.), *cert. denied*, 488 U.S. 967 (1988). In *Austin*, we reviewed Kentucky's admission procedures for mentally retarded adults. Prior to our decision in *Austin*, Kentucky involuntarily committed mentally retarded adults to its RTCs without the benefit of a hearing. However, the State considered virtually all of its mentally retarded admissions to be voluntary. For example, the State treated those admissions that were initiated by the parent or guardian of the mentally retarded adult as voluntary. We held in *Austin* that mentally retarded adults are involuntary committed when admission is made upon the application of a parent or guardian. We also held that mentally retarded adults are entitled to procedural due process prior to being committed involuntarily.

The State is again before us challenging the district court's expansion of the principles which we enunciated in *Austin*. There are three issues raised in this appeal. The first is whether the State must implement a written provision that adults who are voluntarily admitted into a RTC must be released upon their request. Second, we are asked to determine whether the State must satisfy the "beyond a reasonable doubt" burden of proof in order to involuntarily commit a mentally retarded adult. The final issue is whether the State is prohibited from allowing relatives of a mentally retarded adult to join as parties in an action to involuntarily commit the mentally retarded person. The district court answered each of the above questions affirmatively. We reverse the district court's judgment as the first issue, and affirm on each of the remaining issues for the following reasons.

II.

In 1990, the Kentucky General Assembly enacted House Bill 511 which revised Ky. Rev. Stat. Ann. Chapter 202B. Our decision in *Austin* was based on the provisions of Chapter 202B, which governed admissions and discharges of mentally retarded persons.

Plaintiff's first challenge relates to § 4(3) of H.B. 511, which establishes that:

> Upon recommendation or approval of the interdisciplinary team of ICF/MR, the physician shall discharge any voluntarily admitted resident whose care and treatment in the ICF/MR is determined to be no longer necessary or advisable.

According to plaintiff, the statute is constitutionally infirm because it fails to provide for the release of a voluntarily admitted patient upon their request. The State asserts that although the statute does not explicitly provide for voluntarily admitted patients to be released upon request, the State does recognize such a right. The district court stated, however, that "[t]he right to release upon request is an extremely important right; and . . . it cannot be protected by statutory silence." Accordingly, the district court held that § 4(3) of H.B. 511 is unconstitutional to the

extent that it fails to provide for the release of voluntarily admitted adults upon their request.

The State contends that we lack jurisdiction to decide this issue because the instant case fails to present an actual case or controversy. It contends that this Court may strike down legislation only at the instance of one who is himself immediately harmed or immediately threatened with harm by the challenged action. *See Poe* v. *Ullman*, 367 U.S. 497 (1961). We agree.

As a threshold matter, the class represented by plaintiff consists of involuntarily admitted patients. The challenged action affects mentally retarded adults who are voluntarily committed to a RTC. Therefore, the class represented in this action cannot be affected by the challenged action. Moreover, plaintiff has not shown that any voluntarily admitted patient has requested and been denied release from a Kentucky institution. Thus, there is no evidence of any harm whatsoever. Accordingly, we agree that there is no actual case or controversy arising from the instant action, and we reverse the district court's decision on this issue.

The next issue relates to H.B. 511's use of the clear and convincing standard of proof for involuntary commitments of mentally retarded adults. The State uses the beyond a reasonable doubt standard of proof for involuntary commitments of mentally ill adults. Plaintiff successfully argued before the district court that the lesser standard of proof for the mentally retarded violates equal protection.

At the time we decided *Austin*, Ky. Rev. Stat. Ann § 202B.050 provided that:

> All rights guaranteed by [Ky. Rev. Stat.] Chapters 202A (other than those rights enumerated in [Ky. Rev. Stat.] 202A.026 and 202A.051) and [Ky. Rev. Stat.] Chapter 210 to mentally ill persons shall apply to mentally retarded persons.

Ky. Rev. Stat. Ann. Chapter 202A provided for substantial procedural due process prior to the involuntary commitment of mentally ill patients. The rights for mentally ill patients included the right to a preliminary hearing before a person could be involuntarily committed to a state institution, the right to a final hearing and the right to a jury trial. The statute also provided for the right to counsel, the right to testify, present witnesses and cross-examine adverse witnesses, and the right to be present during proceedings.

In *Austin*, we specifically addressed the question of whether mentally retarded adults are entitled to procedural due process prior to being involuntarily committed. Because the State provided for mentally ill adults to receive a hearing prior to being involuntarily committed, we questioned whether there was any rational basis for denying a hearing to mentally retarded adults. The State failed to show any rational basis for differentiating between mentally retarded and mentally ill adults in the provision of a hearing prior to involuntary commitment. Accordingly, we held that equal protection required that the mentally retarded be given a hearing prior to their involuntary commitment. We fail to see any reason for the State to now believe that a substantially lessened burden of proof should govern those hearings for the mentally retarded.

The State asserts that there are several relevant differences between mentally ill and mentally retarded persons which provide a basis for the different standards of proof. It is clear that "the mere identification of differences is not enough; equal protection 'require[s] that a distinction made have some relevance to the purpose for which the classification is made.' " *Austin*, 848 F.2d at 1394, citing *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966). We do not believe that there are any differences between these two classes or the purposes for their commitment which are relevant to the due process which they are entitled to receive.

The State asserts that the purposes for committing mentally retarded persons are different from the purposes for committing mentally ill persons. For example, the State asserts that mental retardation is a permanent, incurable condition, but mental illness can be, and usually is, successfully treated. According to the State, mentally retarded persons are not "treated" but are "habilitated" on a continuing basis. The State asserts that the services at mental retardation facilities are less "intrusive" than those provided for mentally ill patients. The State also contends that there is a stigmatization associated with mental illness that does not attach to mental retardation.

The State's assertions are unsupported by any evidence in the record. There is no evidence whatsoever to show that mentally retarded persons are not "stigmatized," or that the treatment that they receive is less "intrusive" than the treatment administered to mentally ill persons. There is also dispute as to whether mentally retarded persons can be treated so as to improve their condition. The mere assertion of distinctions is clearly insufficient to justify lessened standards to prove that a mentally retarded person should be institutionalized.

Moreover, the issue raised in this case relates to the *liberty* of mentally retarded persons who are threatened with involuntary commitment. Regardless of the asserted benefits of institutionalization, it nevertheless results in the loss of personal liberty. Yet the State seeks to curtail the liberty interests of the mentally retarded under more liberal standards than those standards used for mentally ill adults.

Kentucky law provides that "when a proceeding may lead to the loss of personal liberty, the defendant in that proceeding should be afforded the same constitutional protection as is given to the accused in a criminal prosecution." *Denton* v. *Commonwealth*, 383 S.W.2d 681, 682 (Ky.

App. 1964). The mentally ill and mentally retarded are identical insofar as they lose their personal liberty by involuntary institutionalization. Accordingly, we hold that equal protection requires that the reasonable doubt standard of proof must apply in proceedings to involuntarily commit mentally retarded adults in Kentucky.

We also affirm the district court's holding that Kentucky's practice of allowing third parties to participate in the involuntary commitment proceeding of mentally retarded adults violates equal protection and due process. In *Austin*, we held that the decision to commit a mentally retarded adult is not within the discretion of his or her parents or guardians. *Austin*, 848 F.2d at 1386. Moreover, as recognized by the district court, these parties' interests may be adverse to the person facing commitment. Thus the inclusion of third persons as parties to the action (including the right to appeal decisions which they find adverse) imposes a greater burden than is imposed on similarly situated mentally ill adults. The State has advanced no rational basis for this distinction.

III.

For the above stated reasons, we AFFIRM in part and REVERSE in part.